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TRIBUNAL OF OPINION

Center for International Human Rights
Northwestern University School of Law
357 East Chicago Avenue
Chicago, Illinois 60611 USA
(312) 503-2224

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In the Matter of Deaths and Injuries to Civilians)
in SANTO DOMINGO, Department of Arauca,)
Republic of Colombia, December 13, 1998)

JUDGMENT

December 8, 2000

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CONTENTS

	<u>Paragraph No(s).</u>
Convening and Purpose of Tribunal	1
Members of Tribunal	2
 I. NATURE OF THE PROCEEDING	 3-7
 II. THE COMPLAINT	 8-12
 III. PROCEEDINGS BEFORE THE TRIBUNAL	 13-26
 IV. SOURCES OF LAW	 27-28
 V. EXHAUSTION OF DOMESTIC REMEDIES	 29-69
A. Law on Exhaustion	30-36
B. Domestic Proceedings	37-55
C. Analysis	56-69
 VI. EVIDENCE BEFORE THE TRIBUNAL	 70-71
 VII. EVIDENCE ON EVENTS AT SANTO DOMINGO	 72-100
A. Survivor Testimony Before Tribunal	72
B. Survivor Testimony in Army Court File	73-77
C. Helicopter Pilot Testimony	78-82
D. Statements of Other Air Force Personnel	83-84
E. Forensic Evidence	85-90
F. Army Testimony	91-95
G. Embassy Letter	96-97
H. Lists of Victims and Causes of Deaths and Injuries	98-100

VIII. EVIDENCE ON INVESTIGATIONS AND LEGAL PROCEEDINGS	101-05
IX. PUBLIC STATEMENTS BY MILITARY OFFICIALS	106-11
X. EVIDENCE ON BROADER CONTEXT OF HUMAN RIGHTS AND VIOLENCE	
A. Victims' Evidence On Human Rights Violations in Arauca	112
B. Victims' Evidence On Human Rights Violations in Colombia	113-14
C. Defense Evidence on Context of Violence	115-16
XI. EVIDENCE ON ROLE OF UNITED STATES	117-19
XII. FINDINGS OF FACT	120-22
XIII. CONCLUSIONS OF LAW	123
XIV. RECOMMENDATIONS	124
SEPARATE CONCURRING OPINION OF TRIBUNAL MEMBER DOHRN	

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DRAFT JUDGMENT

1. This Tribunal of Opinion was convened by the Center for International Human Rights of Northwestern University School of Law in Chicago, Illinois, United States of America, in response to a request from human rights organizations in Colombia. Its purpose is to determine whether the Republic of Colombia is responsible, under international human rights and humanitarian law, for the deaths of seventeen civilians, including six children, and the wounding of some 25 other civilians, in the hamlet of Santo Domingo, Department of Arauca, Republic of Colombia, on December 13, 1998, allegedly as a result of a bomb dropped by a Colombian air force helicopter, and to make pertinent recommendations.

2. The President of the Tribunal is former Illinois Supreme Court Justice Seymour Simon, now an attorney in the Chicago office of the law firm of Piper Marbury Rudnick & Wolfe. The other members are as follows:

Peter Baugher	Attorney, Schopf & Weiss, Chicago
Bernardine Dohrn	Director of the Children and Family Justice Center, Northwestern University School of Law, Chicago
Rita Fry	Cook County Public Defender, Cook County, Illinois
Jesus Garcia	Director of Little Village Development Corp., Chicago; Former Illinois State Senator
Maricela Garcia	Executive Director of the Illinois Coalition for Immigrant and Refugee Rights, Chicago

Thomas Gumbleton	Auxiliary Bishop, Roman Catholic Archdiocese of Detroit
Rev. Timothy Keating	Executive Director, Conference of Major Superiors of Men, Roman Catholic Church, Washington, D.C.; attorney licensed in Illinois and the District of Columbia
Dawn Clark Netsch	Professor of Law Emeritus, Northwestern University School of Law; former Senator and Comptroller, State of Illinois
Dom Rizzi	Attorney, Of Counsel, Miller Faucher & Cafferty, Chicago; former Illinois Appellate Court Justice
Arnold J. Wolf	Senior Rabbi Emeritus, KAM Isaiah Israel Temple, Chicago

I. NATURE OF THE PROCEEDING

3. The Tribunal has no official or legal status. Its members are individuals asked to hear evidence, apply international law and render fair judgment on the responsibility, if any, of the Republic of Colombia for the events in Santo Domingo. Its Judgment will have moral effect and, it is to be expected, practical consequences. The Judgment will be made public and communicated to governmental and international officials.

4. The proceeding before the Tribunal concerns "State responsibility" under international law, that is, the alleged responsibility of the Republic of Colombia for violations of its commitments under international law. The Tribunal is not passing judgment on the legal responsibility of individuals, although their conduct may be relevant to the State's responsibility. Likewise it does not focus on the responsibility of particular governments, or particular State institutions, whether executive, legislative or judicial, civil or military. If the international obligations of the Republic of Colombia have been violated by some agency or agent of the State, the State is responsible under international law.

5. Four key elements of the law of State responsibility were summarized by the Inter-American Court of Human Rights ("Inter-American Court") in the leading case of *Velásquez Rodríguez* and its progeny:¹

¹Judgment of July 29, 1988, 1988 ANNUAL REPORT INT.AM.CT.H.RTS 35 (1988). *Velásquez Rodríguez* is the most frequently cited decision of the Inter-American Court, both in that Court's own subsequent cases and in the decisions of other international and national courts. The Inter-American Court is the human rights tribunal of the Organization of American States (OAS). For its recent decisions, see the OAS web site at <http://www.oas.org>, under "Human rights."

(A) "... [A]ny exercise of public power that violates the rights recognized by the [American] Convention [on Human Rights] is illegal. Whenever a State organ, official or public entity violates one of those rights, this constitutes a failure of the duty to respect the rights and freedoms set forth in the Convention." (Par. 169.)

(B) "This conclusion is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law." (Par. 170.)

(C) "Thus, in principle, any violation of the rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State." (Par. 170.)

(D) "An illegal act which violates human rights and which is initially not directly imputable to a State ... can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention." (Par. 172.)

6. The Tribunal provided the Government of the Republic of Colombia with prior notice on July 25, 2000 and invited the Government to participate. Because Colombia declined the invitation, the Tribunal appointed attorneys to represent its interests. In contrast, notice and opportunity to be heard were not afforded to individuals or to non-State entities such as guerrilla groups. The Tribunal has not undertaken to determine their responsibility, and nothing in its Judgment should be understood to express an opinion concerning the legal responsibility of any individual or entity other than the State.

7. The Tribunal also did not give notice or opportunity to be heard to the Government of the United States (although it did inform the Government of the proceeding, by letter dated August 15, 2000). The Tribunal has not attempted to determine the responsibility, if any, of the United States for any events in Colombia. However, extensive information was placed in the record before the Tribunal concerning the role of the United States. Moreover, the prayer for relief in the Complaint asks the Tribunal, among other relief, to recommend that the "Government of the United States direct appropriate communications to the Government of Colombia, and take appropriate measures under its national laws." Accordingly, the role of the United States is addressed below, in connection with the Tribunal's recommendations.

II. THE COMPLAINT

8. The proceeding before the Tribunal was initiated by a Complaint accusing the Republic of Colombia, "on the basis of documented indications, of responsibility for serious violations of international human rights law, and of international humanitarian law," in connection with the

deaths of approximately 19 civilians and the wounding of 25 more in Santo Domingo on December 13, 1998.

9. The Complaint alleged the following:

- (1) On Sunday, December 13, 1998, approximately 19 defenseless, unarmed, non-combatant civilians were killed, and approximately another 25 wounded, in the hamlet of Santo Domingo, Department of Arauca, Republic of Colombia.
- (2) Among the victims were approximately seven minor children killed, and others wounded.
- (3) The deaths and injuries were caused by the dropping of a military bomb on the hamlet by at least one helicopter of the Colombian Air Force ("CAF").
- (4) There existed neither military necessity nor legal justification for the bombing. While there was combat between Colombian armed forces and guerrillas in the vicinity of the hamlet on the day of the events and the previous day, neither the combat nor the combatants entered the hamlet on either day, prior to the bombing that killed and wounded the civilians.
- (5) The circumstances of the bombing – among others, the presence of other CAF helicopters and the clear visibility – indicate that it is unlikely that the bombing was planned and executed exclusively by the crew of a single helicopter and, on the contrary, that it is more likely that the bombing was ordered, or at least known about beforehand or contemporaneously, by senior officers of the Colombian armed forces.
- (6) There are indications that the events in Santo Domingo that day were filmed, at least in part, by an airplane, either of the CAF or of a private enterprise collaborating with the CAF.
- (7) After the bombing, members of the CAF attempted to impede the survivors from reaching medical assistance.
- (8) After the bombing, members of the Colombian armed forces sacked the hamlet of Santo Domingo.
- (9) After the bombing, Colombian military officials attempted to cover up the facts and the responsibility of the CAF, thereby obstructing justice and attempting to blame the guerrillas by, among other means, disseminating false and fabricated versions of the facts.
- (10) The judicial and administrative bodies, both military and civilian, have not duly investigated the facts, nor have they duly and timely prosecuted those apparently

responsible, in spite of serious indications of the responsibility of members of the armed forces of Colombia, and notwithstanding the passage of 19 months since the events:

(a) The military judicial inquiries did not even reach the stage of opening a formal investigation;

(b) Only in approximately June of 2000 did the civilian prosecutor open a formal criminal investigation, but instead of proceeding with the investigation, remanded it to the military courts, which have a notorious record of impunity in cases of apparent military violations of human rights and of international humanitarian law;

(c) Only in June of 2000 did the civilian Attorney General order the opening of a formal disciplinary investigation, but only against the helicopter crew, and against one army major for the subsequent sacking of the hamlet.

(11) There exists a pattern of impunity for violations of human rights, and of international humanitarian law, in cases in which members of the Colombian armed forces are apparently responsible, both in the Department of Arauca, and in the Republic of Colombia, especially when the military courts are in charge of inquiries and investigations.

10. The Complaint alleged that the Republic of Colombia was, at the time of the events, and continues to be, a State Party to the following treaties on international human rights and humanitarian law: American Convention on Human Rights; International Covenant on Civil and Political Rights; Convention on the Rights of the Child; Geneva Convention Relative to the Protection of Civilian Persons in Time of War; and Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts. The Complaint further alleged that the Republic of Colombia is subject to relevant customary international law.

11. The Complaint alleged that the Republic of Colombia was responsible for the following violations of international law in connection with the events at Santo Domingo:

(1) For causing deaths,²

(2) For causing physical injuries,³

²Alleged to violate art. 4 of the American Convention, art. 6 of the Civil Covenant, arts. 6.1 and 6.2 of the Child's Convention, art. 3.1(a) of the Geneva Convention, and art. 4.2.a of Protocol II.

³Alleged to violate art. 5 of the American Convention, art. 7 of the Civil Covenant, art. 3.1(a) of the Geneva Convention, and art. 4.2.a of Protocol II.

(3) For the bombing of defenseless, unarmed, non-combatant civilians, in a civilian hamlet,⁴

(4) For deaths, injuries and suffering of minor children,⁵

(5) For attempting to impede the securing of medical treatment for the victims,⁶

(6) For the subsequent sacking of the hamlet,⁷

(7) For the failure to conduct an adequate investigation and prosecution of those responsible, including for possible military command responsibility, and for possible responsibility for covering up and obstruction of justice,⁸

(8) For the failure to provide due and adequate reparations to the victims, survivors and family members,⁹ and

(9) For the failure to adopt legislation and other governmental measures reasonably designed to ensure the enjoyment of the aforementioned rights.¹⁰

⁴Alleged to violate arts. 13.1 and 13.2 of Protocol II, and arts. 38.1 and 38.4 of the Child's Convention.

⁵Alleged to violate art. 24.1 of the Civil Covenant, arts. 2.1, 2.1, 3.2, 4, 19.1, 24.1, 24.2.b, and 37.c of the Child's Convention, and art. 4.3 of Protocol II.

⁶Alleged to violate arts. 1.1 and 5 of the American Convention, arts. 2.1 and 7 of the Civil Covenant, arts. 24.1 and 24.2.b of the Child's Convention, art. 3.2 of the Geneva Convention, and arts. 4.2, 7.1 and 7.2 of Protocol II.

⁷Alleged to violate art. 21 of the American Convention and art. 4.2.g of Protocol II.

⁸Alleged to violate arts. 1.1, 8.1 and 25 of the American Convention, arts. 2.1, 2.3 and 14.1 of the Civil Covenant, and arts. 2.1, 3.2 and 19.1 of the Child's Convention, and of customary international humanitarian law.

⁹Alleged to violate arts. 1.1, 8 and 25 of the American Convention, arts. 2.1, 2.3 and 14.1 of the Civil Covenant, and art. 39 of the Child's Convention.

¹⁰Alleged to violate arts. 1.1 and 2 of the American Convention, arts. 2.1 and 2.2 of the Civil Covenant, and arts. 2.1 and 4 of the Child's Convention.

12. The Complaint asked the Tribunal to declare its judgment on the facts of the case and on the alleged violations of international law, and to recommend:

- (1) due investigations and proceedings by the proper authorities of the Republic of Colombia,
- (2) investigations and appropriate measures by relevant international agencies,
- (3) That the Republic of Colombia provide adequate reparations to victims, survivors and family members, and
- (4) That the Government of the United States direct appropriate communications to the Government of Colombia, and take appropriate measures under its national laws.

The Complaint also asked the Tribunal to communicate its judgment to the Governments of Colombia and the United States, to relevant international agencies, and to public opinion, and to make such other conclusions and recommendations as may be necessary in the interests of justice and of overcoming impunity for violations of human rights and of international humanitarian law in Colombia.

III. PROCEEDINGS BEFORE THE TRIBUNAL

13. The Tribunal sent a Notice of Proceeding and Opportunity for Defense, and a copy of the Complaint, to the Colombian Foreign Ministry on July 25, 2000. The Notice advised the Republic of Colombia that it would be the subject of the proceeding, "based on indications of possible responsibility for serious violations of international human rights law" in connection with the events at Santo Domingo on December 13, 1998. It advised Colombia of the public hearing before the Tribunal scheduled for September 22 and 23 in Chicago, and invited Colombia to name an agent and defense attorney, and to present evidence and briefs or to participate in any other manner it might deem appropriate.

14. On August 4, 2000, the Acting Vice Minister of Foreign Affairs for the Republic of Colombia replied by letter. He expressed "basic objections" to the Tribunal's appropriateness and timeliness. Its opining on individual behaviors and State responsibility on informal bases was flawed legally and methodologically. Such activity properly corresponds to the administration of justice, a function exclusively within the sovereignty of the State. Since criminal and disciplinary investigations of the case by the Prosecution and Attorney General of the Nation were still pending, domestic remedies had not been exhausted. The Tribunal would in practice interfere, "through trials without legal value," in the investigations, accusations and adjudication by competent Colombian authorities. It would contribute to de-institutionalizing justice in Colombia, discouraging the investigating authorities, casting doubt on their work, and generating a "prejudgment of responsibilities" by public opinion. The Government would refer the Santo Domingo case to the Vice President of the Republic and High Commissioner for

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Human Rights, to include on the agenda of the "Special Support Committee for Investigations Concerning Human Rights," over which he presides. Anyone with information or knowledge was invited to intervene before that Committee.

15. On August 10, 2000, the Tribunal's Legal Adviser replied to the Vice Minister's letter. Noting delays in Colombia's investigations and its relegation of the criminal investigations to military courts, he reiterated the Tribunal's willingness to support measures designed to advance justice, and its invitation to the Republic of Colombia "to participate in the Tribunal of Opinion in any manner it deems fit."

16. No further reply was received from the Government of Colombia. Accordingly the Tribunal appointed two Chicago attorneys, not authorized by the Government of Colombia, to represent the interests of the Republic of Colombia before the Tribunal. They are John Lee, who has broad knowledge of international law, and John Slater, who has extensive trial experience in cases involving rights of children.

17. The Tribunal likewise appointed attorney David Stahl, a specialist in litigation and partner in the Chicago law firm of Eimer, Stahl, Klevorn & Solberg, to represent the victims.

18. Counsel for both parties and all members of the Tribunal served without compensation. Counsel were assisted by law students of Northwestern University School of Law.

19. On September 19, 2000, the President of the Tribunal held a pre-hearing conference with counsel for the parties and the Tribunal's Legal Advisor. On September 20 he issued a pre-hearing order on procedures and the schedule for the public hearings and approving the Rules of Procedure and Evidence for the Tribunal. The Rules provide that the files of the Colombian military court inquiries on the case would be placed into the record before the Tribunal. The Order noted, but reserved ruling on defense counsel's objection to admission of evidence concerning United States military aid to Colombia.

20. Public hearings before the Tribunal were held at Northwestern University School of Law in Chicago on Friday and Saturday, September 22 and 23, 2000. Eight witnesses traveled from Colombia to testify on behalf of the victims. For reasons of security and pursuant to the Rules of the Tribunal, four of these witnesses, survivors of the events at Santo Domingo, were identified publicly only as witnesses 1, 2, 3 and 4, and screened from public view during their testimony. The President of the Tribunal also admonished all present not to photograph or film them. However, their identities were known to counsel for both parties and to the members of the Tribunal, who also could see them and observe their demeanor as they testified. All witnesses were subject to cross examination by defense counsel and to questions by members of the Tribunal.

21. Other witnesses from Colombia included a Catholic priest who is an expert on human rights in that nation; an attorney for the victims; and a labor leader and a leader of a non-governmental

human rights organization, both from Arauca. Although they testified in public, their names are not repeated here, in order to minimize any risks to their personal security. For the same reason, this Judgment does not identify other witnesses by name, including those who testified before Colombian military courts. However, the names of all witnesses are in the Tribunal's files.

22. One additional witness, Mr. Barry Romo, a former United States Army officer who visited Santo Domingo in June 2000, testified for the victims.

23. Defense counsel presented two expert witnesses. Professor Mark Wojcik of John Marshall Law School of Chicago, an expert on international law, testified on the international law principle of exhaustion of domestic remedies. Professor Frank Safford of the History Department of Northwestern University, a specialist on Colombia, testified on the difficult situation of violence confronting the Government of Colombia.

24. Defense counsel also presented an approximately half hour video, "The Great Truth About Santo Domingo," produced and disseminated by the Colombian military in 1999 and presenting its version of events. The video, with its English sound track narration, was shown on a large screen in the hearing room.

25. In addition, voluminous documents, including statements by survivors and military personnel in the military court files in the case, were placed in evidence.

26. Following the public hearings, additional documents and briefs of both parties were received. All documents of the Tribunal, including evidentiary documents, and summary transcripts and audio and video recordings of the public hearings, are available for public inspection at the Center for International Human Rights (subject to deletion of certain witness names and other identifying information for security reasons). Many documents are available in both English and Spanish. Electronic versions, to the extent available, will be placed on the Center's web site, <http://www.law.northwestern.edu/humanrights>, as soon as possible.

IV. SOURCES OF LAW

27. The substantive law applied by the Tribunal consists of six sources of international human rights and humanitarian law. Five are treaties ratified by the Republic of Colombia and binding on it at all relevant times. The treaties, and the years in which they were ratified by Colombia, are as follows:

- (1) American Convention on Human Rights (1973).¹¹

¹¹Done at San José, Nov. 22, 1969. Entered into force, July 18, 1978. O.A.S. Treaty Ser. No. 36, O.A.S. Off.Rec. OEA/Ser.L/V/II.23 doc. 21 rev. 6 (1979), reprinted in 9 I.L.M. 673 (1970), accessible at <http://www.oas.org>.

(2) International Covenant on Civil and Political Rights (1969).¹²

(3) Convention on the Rights of the Child (1991).¹³

(4) Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1961).¹⁴

(5) Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (1995).¹⁵

In addition, Colombia is subject to relevant customary international law.

28. On matters of evidence and burden of proof, the Tribunal was guided by the jurisprudence and practice of the Inter-American Court. (See below.) Evidence tendered was generally admitted before the judges, with objections going to weight rather than admissibility.

V. EXHAUSTION OF DOMESTIC REMEDIES

29. Before addressing the merits, the Tribunal first considers a preliminary objection by defense counsel, initially raised by Colombia's Acting Vice Minister of Foreign Affairs, who stated that "... the investigations, still pending, are being carried forward by the Prosecution and the Attorney General of the Nation, insofar as criminal and disciplinary proceedings are concerned. ... For the events which occurred in Santo Domingo, Arauca, on December 13, 1998, the remedies guaranteed by Colombian laws have not yet been exhausted."¹⁶

A. Law on Exhaustion

30. The requirement that domestic remedies be exhausted before resort to international courts or bodies is both a general principle of international law and a specific requirement of the American Convention (art. 46.1.a). As explained by the defense expert witness, Professor Wojcik, the rule

¹²Done at New York, Dec. 16, 1966. Entered into force, Mar. 23, 1976. U.N.G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1967), reprinted in 6 I.L.M. 368 (1967), accessible at <http://www.un.org>.

¹³Done at New York, Nov. 20, 1989. U.N.G.A. Res. 25 (XLIV), U.N. Doc. A/RES/44/25 (1989), reprinted in 28 I.L.M. 1457 (1989), accessible at <http://www.un.org>.

¹⁴Done at Geneva, Aug. 12, 1949. Entered into force, Oct. 21, 1950. 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287, accessible at <http://www.un.org>.

¹⁵Done at Geneva, June 8, 1977. Entered into force, Dec. 7, 1978. 1977 U.N. JURID.Y.B. 135, reprinted in 16 I.L.M. 1442 (1977), accessible at <http://www.un.org>.

¹⁶August 4, 2000 letter to the Tribunal's Legal Adviser (Ex. V-5).

has three main rationales. First, it fosters development of domestic legal and human rights institutions, providing them an opportunity to correct domestic errors. Second, domestic institutions may have expertise, access to evidence, and compulsory legal process and remedies not available to international courts. Third, international institutions have limited resources and, therefore, ought not to take cases unnecessarily.

31. Although the rule requiring exhaustion of domestic remedies does not strictly apply to informal bodies such as this Tribunal, nonetheless the Tribunal deems it prudent to apply it here. The reasons for exhaustion apply with even greater force here: an ultimate purpose of this proceeding is to encourage pursuit of justice by Colombian institutions, and this Tribunal lacks legal powers and clearly has limited resources.

32. The exhaustion requirement, however, is not absolute. Domestic remedies need be exhausted only if they are both adequate and effective. *Velasquez Rodriguez*, par. 63.¹⁷ Adequate remedies must be suitable to address a particular violation. *Id.* par. 64. For example, where a human rights violation may have involved a crime such as homicide, merely administrative remedies are not adequate; there must be a serious criminal investigation and, if warranted by the evidence, a genuine prosecution. *See id.* pars. 174, 176-77.

33. Domestic remedies must also be *effective*, that is, capable of producing the result for which they are designed. *Id.* par. 66. For example, where remedies are denied "without an examination of the merits," or there exists a practice or policy favoring impunity, domestic remedies are not effective. *Id.* par. 68.

34. Domestic remedies also need not be exhausted if they deny due process, if victims are denied access, or if they are unduly delayed. American Conv. on Human Rights, art. 46.2.a, b, and c.

35. In international human rights proceedings, the state has the burden to show the existence of specific remedies that should have been utilized. *Velasquez Rodriguez*, par. 60. The state also has the burden to show that those remedies are effective. *E.g., Durand y Ugarte Case*, Inter-American Court, Series C, No. 50, Preliminary Objections, Judgment of May 28, 1999, par. 33 and cases cited therein. Once the state makes that showing, the burden shifts to complainants to show either that the remedies were exhausted, or that they are inadequate, ineffective or otherwise need not be exhausted.

¹⁷For other decisions of the Inter-American Court on exhaustion of remedies, all following and in accord with *Velasquez Rodriguez*, *see, e.g., Fairén Garbí y Solís Corrales Case*, Preliminary Exceptions, Order of June 26, 1987, Series C no. 2; *Godínez Cruz Case*, Preliminary Exceptions, Order of June 26, 1987, Series C no. 3; *Gangaram Panday Case*, Preliminary Exceptions, Order of December 4, 1991, Series C no. 12; *Neira Alegria and Others Case*, Preliminary Exceptions, Order of December 11, 1991, Series C no. 13; *Castillo Páez Case*, Preliminary Exceptions, Order of Jan. 30, 1996, Series C no. 24; *Loayza Tamayo Case*, Preliminary Exceptions, Order of January 31, 1996, Series C no. 25; *Cantoral Benavides Case*, Preliminary Exceptions, Order of September 3, 1998, Series C no. 40; *Durand y Ugarte Case*, Preliminary Exceptions, Order of May 28, 1999, Series C no. 50. For texts of recent Inter-American Court decisions, see <http://www.oas.org>, under "human rights."

36. Here there is no dispute that Colombia has a range of domestic remedies – criminal, administrative and civil – and that they have not been exhausted.¹⁸ The question is whether, in the circumstances of this case, they are adequate and effective, timely, accessible and consistent with due process of law.

B. Domestic Proceedings¹⁹

37. Here the allegations of an unjustified bombing of a civilian hamlet, causing multiple deaths and injuries of civilians, prompted preliminary criminal investigations. Criminal cases before Colombian civilian and military courts generally begin with a preliminary investigation to determine whether there is reason to believe that a crime was committed and reason to suspect a particular individual or individuals. If so, then a formal investigation is opened. If it yields sufficient evidence, then a trial is conducted. Appeals may follow.

38. During a preliminary investigation, victims are not formal parties and do not have access to the file or participate in interrogating witnesses. Once a formal investigation is opened, however, victims can apply to become parties, entitled to access to the file and to participate actively in the investigation and prosecution.

39. Within days of the incident at Santo Domingo on December 13, 1998, three preliminary criminal investigations were opened: one by the army, another by the air force, and a third by the local civilian prosecutor, which on December 17 was taken over by the National Human Rights Unit (NHRU) of the Prosecutor General of the Nation. The military inquiries were conducted by military investigating judges.

40. The military judges took statements from civilian survivors (Ex. V-21)²⁰ and from military personnel, and received necropsy reports on nine deceased victims (Ex. V-22) as well as the initial forensic analysis reports by official investigators. The survivors testified that an explosive device had been dropped or fired from helicopters above the hamlet, while the military witnesses denied any knowledge of such an event.

¹⁸The defense brief (pp. 15-17) cites numerous Colombian domestic institutions with varying competence to provide remedies for human rights violations (the Constitutional Court, Prosecutor General, Superior Council of the Judiciary, Attorney General, Human Rights Ombudsman, and the "tutela" action). The Tribunal does not question that these remedies exist; the question is whether, in the circumstances of this case, they are adequate and effective.

¹⁹This subpart is based on review of domestic judicial orders, opinions and forensic reports referred to therein, supplemented by testimony before the Tribunal by a Colombian lawyer representing the victims.

²⁰Counsel for victims submitted a book of exhibits, which was received in evidence, numbered Victims' Exhibits 1-30. Those exhibits are referred to herein as "Ex. V-1," etc.

41. The initial forensic report by the Technical Investigation Corps (CTI) of the Prosecutor General's office, dated December 28, 1998, indicated that possibly a homemade explosive device was involved.

42. Various military forensic investigators reported finding no manufactured explosive devices or ingredients such as TNT. They suggested that small craters in the roadway in Santo Domingo were caused by grenades or mortars, or by burning some type of combustible, and that parts of cluster rockets found at the scene were too rusted and old to have been used in the incident.

43. The preliminary investigation by the army was closed (*archivado*, literally, "archived") on December 28, 1998, without prejudice to its possible reopening in the event of further evidence. (Ex. V-23.)

44. Likewise the preliminary investigation by the air force was closed (*archivado*) on May 20, 1999, without prejudice.

45. However, the civilian preliminary investigation by the NHRU continued. On June 10, 1999, NHRU requested a new inspection and analysis by the National Institute of Legal Medicine and Forensic Sciences. On June 18, 1999, two specialists from that Institute, one in forensic ballistics and the other in forensic photography, visited Santo Domingo. The resultant December 10, 1999 report from the Institute's Forensic Ballistic Laboratory concluded, among other points, that the truck which, according to the military, contained a car bomb, had in fact been hit from above, rather than exploding from within.

46. NHRU then sought further technical analyses. On April 28, 2000, the CTI issued a new report (Ex. V-25; detailed below), reversing the conclusions of its December 28, 1998 report. The new report explained that the initial report was prepared under time pressure, in the face of nearby combat. The CTI had now conducted "various explosives and ballistics tests, new judicial inspections, detailed exploration of the site of the events, new discoveries and technical expert analyses." Finding that metal fragments recovered from the scene were the same as those recovered from the deceased victims, CTI concluded that the hamlet had been hit by "the 6 bombs AN-M1 A2 or AN-M158 which normally are thrown from an airship with the CLUSTER device," producing six points of impact, including one "on top of the truck."

47. In addition, on March 24, 2000, through the U.S. Embassy, NHRU sent several fragments to the FBI crime laboratory for analysis. On May 1, the FBI issued a report, which was provided to NHRU. (Ex. V-1; detailed below.) The FBI concluded that the fragments analyzed were "consistent with a twenty (20) pound United States designed AN-M41 fragmentation bomb and fuze," designed to be dropped from a minimum altitude of 400 feet, and "designed to be suspended individually or dropped as part of a cluster of six (6) bombs in the Cluster Adapter AN-M1 A2 or M-1." The fragments analyzed by the FBI contained no evidence of any "improvised delivery system." They did contain TNT.

48. On May 30, 2000, NHRU issued an order opening a formal criminal investigation of the events in Santo Domingo during December 12 to December 20, 1998.

(A) With respect to military suspects, the order revoked the May 20, 1999 air force order closing the case. It opened a formal investigation of the three members of the crew of air force helicopter UH-IH FAC 4407, on charges of aggravated homicide, aggravated personal injury and damage to property of others, for allegedly bombing the civilian population of Santo Domingo. But rather than conduct the investigation, NHRU ordered the file sent to the air force court to conduct the investigation.

(B) With respect to guerrilla suspects, the order opened a formal investigation, to be conducted by NHRU, of several alleged guerrillas on charges of aggravated homicide, personal injury, terrorism and rebellion, based on their alleged "responsibility for the deaths of the members of the National Army, the destruction of the hamlet and the insurgent activities carried out."

49. Meanwhile, the Attorney General had separately conducted a preliminary disciplinary investigation into the case. Colombia's Attorney General and Prosecutor General are separate and independent; the Attorney General has no criminal jurisdiction. The sole purpose of the Attorney General's investigations is administrative or disciplinary with respect to public servants, including members of the military, whom the Attorney General may discipline, including by suspension or discharge.

50. Following receipt of the new technical reports, on June 13, 2000, the Attorney General opened a formal disciplinary investigation of the same helicopter crew implicated in the criminal case. (Ex. V-30.) He also opened a formal disciplinary investigation of the Army Major who was Commander of Counterguerrilla Battalion No. 36, "for the irregular acts previously mentioned violating International Humanitarian Law." Those acts included the alleged sacking and pillage of the hamlet during its occupation by the army in the days following December 13, 1998.

51. Once the criminal file was transferred from NHRU to the air force court, attorneys for the victims applied to be designated as civil parties in the case. On September 11, 2000, the air force hearing officer issued an order declaring the May 30 NHRU order a legal nullity, insofar as it purported to revoke the earlier air force order and to direct the opening of a formal investigation of military personnel. Viewing the case still as a preliminary investigation, the September 11 order denied the victims' request to join as civil parties. However, noting that the new evidence obtained by NHRU had not previously been considered by the air force judge, the September 11 order directed that an air force investigator inspect NHRU's file on September 27, 2000. Subsequent to the public hearings before the Tribunal on September 22-23, 2000, the Tribunal has been informally advised that NHRU has asked that the case file be returned to it, but that the air force court has retained jurisdiction and kept the official file.

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52. Meanwhile, the pilot of the helicopter crew, claiming violations of his due process and other rights, filed a legal action (*tutela*) against NHRU before the Criminal Chamber of the Superior Court of Bogota, a civilian court. On September 21, 2000, that court held that the May 30 order by NHRU exceeded its authority in purporting to revoke the air force order closing the case. It annulled the part of the May 30 order relating to military suspects. The part of the May 30 order (see par. 48 above) relating to guerrilla suspects was left intact.

53. The victims cannot appeal either the September 11 order by the air force court or the September 21 order by the Superior Court, since they are not parties to either proceeding. According to the testimony of one of their attorneys before the Tribunal, the victims could, in theory, attempt some sort of legal action (*tutela*) against the NHRU order sending the case to the air force court, but it would be difficult to prevail in such an action.

54. Another potential remedy for the victims, according to their attorney, would be a "contentious administrative proceeding" against the state, seeking damages.²¹ That remedy has not yet been attempted.

55. A further remedy was suggested by the Vice Minister. His August 4 letter stated that the Government "will proceed to request the Vice President of the Republic and High Commissioner for Human Rights, to include the case among those considered by the 'Special Support Committee for Investigations Concerning Human Rights,' which he presides."

C. Analysis

56. Based on the information available to the Tribunal, the status of official investigations of military suspects appears to be as follows:

(A) The civilian NHRU, at least as of September 2000, was no longer conducting even a preliminary investigation of military suspects.

(B) The preliminary criminal investigation by the army has been closed (without prejudice) since December 1998, and not reopened, despite the Attorney General's opening of a formal disciplinary investigation of an army major for allegedly sacking Santo Domingo.

(C) The preliminary criminal investigation by the air force was closed for 17 months (May 1999 to September 2000). It has apparently now been reopened, at least to a limited degree. However, because it remains preliminary, the victims are not parties, and are not entitled to access to the file or to participate in the investigation.

²¹"Contentious administrative proceedings" are damages actions against the State for violations of rights.

(D) Formal administrative investigations were opened in June 2000 by the Attorney General against one helicopter crew and one army major. Those investigations remain pending.

(E) There has been no investigation whatsoever of the possible knowledge or responsibility of senior officers before, during, or immediately following the alleged bombing, or of any possible cover-up or obstruction of justice, despite inconsistencies between public statements by the military and the civilian forensic and testimonial evidence.

57. In these circumstances, it is difficult to view the criminal proceedings initiated by the Colombian State in this case as "effective" remedies whose exhaustion is required. By the end of September 2000 -- 21 months after the alleged bombing, and five months after the CTI and FBI forensic reports -- no military personnel have been prosecuted, punished or disciplined. None are even the subjects of formal criminal investigations. The only preliminary criminal investigation now underway, to some degree at least, is before a military (air force) court.

58. The apparent ineffectiveness of criminal remedies in this case is reinforced when viewed against the background of a pattern of impunity in human rights cases involving members of the Colombian military. As noted by the 1999 report of the Inter-American Commission of Human Rights (the official human rights monitoring body of the Organization of American States):

"Human rights monitors assert that virtually 100% of all crimes involving human rights violations go unpunished. The experience of the Commission ... substantially supports this assertion. The Commission is aware of only a very few cases in which State agents responsible for human rights violations have received criminal convictions."

"Impunity in Colombia is structural and systemic. It is not simply a question of leaving numerous individual crimes unpunished. Rather, the issue is one of the creation of an entire system of impunity ..."²²

59. The ineffectiveness of criminal remedies in this case is further evidenced by the fact that as of September 2000, the only pending criminal investigation -- still preliminary -- is before a military court.²³ As the Inter-American Commission reported:

"The problem of impunity is aggravated by the fact that the majority of cases involving human rights violations by members of the State's public security forces are processed by the military justice system. The Commission has repeatedly condemned the military

²²Inter-American Commission on Human Rights, Third Report on the Situation of Human Rights in Colombia (1999), pars. 14, 16 (footnote omitted) (Ex. V-24).

²³The Attorney General is pursuing a disciplinary investigation. In Colombia criminal investigations of military personnel are conducted either by the civilian Prosecutor General or by the military courts.

jurisdiction in Colombia ... for failing to provide an effective and impartial judicial remedy for violations of [American] Convention-based rights, thereby insuring impunity and a denial of justice in such cases. In Colombia specifically, the military courts have consistently failed to sanction members of the public security forces accused of committing human rights violations."²⁴

60. In addition to its ineffectiveness, the fact that the only criminal remedy against military suspects in this case is now before a military court, which initially closed the investigation and later declared the NHRU Order reopening the case to be a legal nullity, also demonstrates a denial of due process, another exception to the exhaustion requirement. As the Commission reported:

"... [T]he criminal investigations carried out in the military justice system impede access to an effective and impartial judicial remedy. When the military justice system conducts the investigation of a case, the possibility of an objective and independent investigation by judicial authorities which do not form part of the military hierarchy is precluded. Investigations into the conduct of members of the State's security forces carried out by other members of those same security forces generally serve to conceal the truth rather than to reveal it. ... The military forces will probably not have gathered the evidence in a timely and effective manner. In those cases which remain in the military justice system, the investigation will frequently be conducted in such a manner as to prevent the case from reaching the final decision stage."²⁵

Colombia's military judicial investigations, as noted in these passages, are neither independent nor impartial, both of which are fundamental requirements of due process. For this additional reason, Colombia's criminal remedies in this case need not be exhausted.

61. Further issues arise as to whether the criminal investigations in this case – still "preliminary" some 21 months after the alleged bombing – have been unreasonably delayed, and whether, because the case remains at the preliminary stage, victims have been denied access to the ordinary Colombian remedy of participation as civil parties in the criminal case. Whether these issues, by themselves, would justify a failure to exhaust the criminal remedies in this case, are questions the Tribunal need not resolve. The ineffectiveness and lack of due process of the investigations, which by September 2000 had dwindled to one military preliminary investigation, suffice to rule that the criminal remedies need not be exhausted.

62. A critical juncture was reached in May 2000. At that time new forensic reports by the CTI and FBI, at minimum, justified opening a formal investigation against the helicopter crew. The civilian prosecutors at NHRU agreed with this assessment. However, they implemented it, not

²⁴*Id.* par. 17 (footnotes omitted).

²⁵*Id.* par. 18.

by opening a civilian investigation, but by sending the case back to the air force court, only to have that court declare the NHRU Order a legal nullity. In view of the prior closure of the case by that court, and the record of impunity of military courts in human rights cases generally, it is difficult to interpret this referral as a genuine effort to see that justice be done. This is confirmed by the subsequent lack of progress in the case.

63. NHRU could have chosen to assert civilian jurisdiction. Colombian military courts lack jurisdiction over military personnel in cases "when the offense is extremely grave, as is the case of what are known as crimes against humanity. In these circumstances, jurisdiction in the case must be conferred on the regular courts, given the total contradiction between the offense and the constitutional missions of the Military Forces ..." (Sentence No. C-358/97 of the Constitutional Court of Colombia, Aug. 5, 1997, par. II.2 (10).) Yet NHRU remanded the case to the military court.

64. Defense counsel argue that aside from the pending criminal proceeding, other judicial remedies remain to be exhausted. The victims have not filed a *tutela* against the May 30 NHRU order transferring the case to the air force court; nor have they yet filed a contentious administrative proceeding against the state for compensatory damages. These potential remedies, however, need not be exhausted, for several reasons. Most important, the state cannot shift its burden of investigation to the victims: "An investigation must ... be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government." *Velasquez Rodriguez*, par. 177. That is especially so where, as here, much of the evidence – such as forensic ballistics analyses, testimony by military officers and military documents – is available to the State, but not readily, if at all, to the victims.

65. Second, in the context of this case, an administrative contentious proceeding is not an "adequate" remedy for purposes of exhaustion. Payment of money damages by the state, even if obtained, cannot meet the state's duty to "carry out a serious investigation of violations ..., to identify those responsible, [and] to impose the appropriate punishment..." *Id* par.174.

66. Nor is Colombia's offer to have the case added to the agenda of an executive branch monitoring committee an adequate remedy. (See pars. 14 and 55 above.) Such a committee is an executive body, not a court; it has no jurisdictional authority to take or to require judicial action or its equivalent.

67. Finally, defense counsel argue that in spite of all of the foregoing, the current administration of President Andrés Pastrana is committed to justice.²⁶ Assuming that to be true, the question

²⁶The defense brief (pp. 17-19) cites evidence that the Prosecutor General investigated, indicted or prosecuted 303 security force members during 1999, including at least 12 officers. But these figures do not reveal how many of these cases involved human rights violations, and how many resulted in convictions. The defense also cites recent investigations of five Generals and other ranking officers in connection with paramilitary massacres; again, this does not indicate whether any were convicted or punished. Finally, the defense cites an October 17,

remains whether that commitment can or will be translated into concrete results that end the pattern of impunity in human rights cases involving the military in Colombia. In August of this year, President Clinton determined that he could not certify the Colombian Armed Forces to be "cooperating fully" with civilian criminal justice in such cases. His Memorandum of Justification explained that, "During the Pastrana Administration, there has been a gradual, but steady, improvement ... but steps remain to be taken before this condition can be certified."²⁷ Perhaps this Judgment will -- as the Tribunal intends -- make a positive contribution to those efforts.

68. Reputable non-governmental human rights monitors are less sanguine. For example, a joint report by the Washington Office on Latin America, Human Rights Watch and Amnesty International, commenting on President Clinton's waiver of human rights conditions for U.S. military aid to Colombia, states, "As far as we have been able to determine, the military has never transferred the case of an officer with the rank of colonel or higher from a military tribunal to a civilian court."²⁸

69. In any event, whatever improvement there may or may not have been in the overall pattern of impunity, it is not visible in this case. The Tribunal holds that the State has failed to meet its burden to show that its remedies are effective. The Tribunal further holds that the criminal proceedings before Colombian military courts are not independent and impartial. For both reasons, the victims need not exhaust domestic remedies in this case.

VI. EVIDENCE BEFORE THE TRIBUNAL

70. The Tribunal followed the rule that "direct evidence, whether testimonial or documentary, is not the only type of evidence that may be legitimately considered Circumstantial evidence, indicia, and presumptions may be considered, so long as they lead to conclusions consistent with the facts." (*Velásquez Rodríguez*, par. 130.) Such evidence may be "especially important" in cases where attempted cover-ups may be involved. (Par. 131.)

2000 report in the *New York Times* that the Colombian government dismissed 89 officers and 299 soldiers accused of misconduct. While this appears to be a positive step, the report does not indicate how many were dismissed for human rights violations. Moreover, only two officers above the rank of major (both Lieutenant Colonels) were reportedly dismissed. *Los Angeles Times*, Oct. 17, 2000, *Colombia Purges Military to Polish Image*.

²⁷White House Memorandum of Justification in Connection with the Waivers under Section 3201(a)(4) of the Emergency Supplemental Act, as enacted in the Military Construction Appropriations Act, 2001, Aug. 23, 2000 (Ex. V-16), at 3.

²⁸Accessible at http://www.wola.org/colombia_adv_certification_jointstatement.html.

71. The principal evidence here consists of testimony before the Tribunal, witness statements and documents from the files of preliminary inquiries by Colombian military courts, a video on the case produced by the military, forensic and expert reports, and a letter from the US Embassy in Bogota.

VII. EVIDENCE ON EVENTS AT SANTO DOMINGO

A. Survivor Testimony Before Tribunal

72. Four survivors of the events in Santo Domingo on December 13, 1998, testified in person before the Tribunal on September 22, 2000. Although their identities were known to the Tribunal and to counsel for both parties, they were publicly identified in the hearings, and are referred to herein, as witnesses 1, 2, 3 and 4. They testified, in substance, as follows:

(A) Witness 1: Witness one resided in Santo Domingo in December 1998. On the afternoon of December 12, he could see helicopters circling the hamlet and could hear them firing. Late that afternoon he and his family, concerned for their safety, left to the house of a neighbor who lives about 800 meters from the town. During the night they could hear a plane flying over the town and shooting. Early the next morning, helicopters were still overhead. Beginning about 8:00 a.m. they could hear explosions.

At about 9:30 a.m. a young man arrived at the house where they had stayed the night. He came on a motorcycle, carrying a child, and saying, "They killed my family and they killed the people of Santo Domingo." He asked for help to save the wounded children.

Witness one and a friend drove toward town in a truck. On the way, a helicopter fired at the truck. His friend waved a white T-shirt out the window, but the helicopter fired at the truck at least twice more. When they got to town, several people were dead, many were wounded and people were screaming. He and his friend loaded many of the wounded into the truck, along with two dead children, and drove toward Tame. As they left Santo Domingo, two helicopters followed them and were shooting right next to the truck; he could see pieces of earth come up when hit.

Four more people died in the truck on the way to Tame. Five kilometers outside Santo Domingo they met cabs and a truck, and moved the most seriously wounded into those vehicles. He then took the six people who had died to Caño Limón. He returned to Santo Domingo to pick up people walking toward him on the road. By the afternoon of December 13 everyone had left Santo Domingo.

On December 12 and 13, there was no guerrilla activity in Santo Domingo; to his knowledge guerrillas had never stayed in Santo Domingo.

On December 16 he returned to Santo Domingo to get his clothes. The army was there. The town was in the same condition he had left it; his home was in order. He did not return until December 27 or 28. By this time the town had been sacked; the houses had been robbed and padlocks broken.

On cross examination, he stated that his truck had not been hit by bullets during the trips into and out of Santo Domingo. Nor, to his knowledge, were the wounded hit while in the back of the truck. Bombing went on continuously on the morning of December 13. He could not see the bombs; he only saw smoke coming out of the helicopter and then right away heard an explosion. He could not see if a bomb landed in Santo Domingo.

In response to questions from the Tribunal, he stated that there were approximately seven helicopters near Santo Domingo on December 13. None of those living in Santo Domingo were members of any guerrilla force. He recalls no time that the government took action to protect the children from the kind of warfare that took place at Santo Domingo. He understood that those in the helicopters on December 13 were from the armed forces, because the helicopters belonged to the armed forces.

(B) Witness 2: Witness two was wounded in Santo Domingo on the morning of December 13, 1998, by whatever fell from the helicopters. Her shoulder was fractured by shrapnel and she still has shrapnel in her arm. At no time on December 13 was she wounded by bullets.

On Saturday, December 12 the people of Santo Domingo were having a bazaar to raise money for the town school. They planned to continue the bazaar on Sunday, but that did not happen.

On Saturday night and early Sunday morning, helicopters were flying over the town, machine-gunning the nearby area. Terrorized, she and about 20 friends attempted to leave the town soon after 6:00 a.m. They walked a few hundred meters, but came back because they were afraid of what was happening around them.

From about 7:00 a.m., until approximately 9:30 to 10:30 a.m., she and her friends lay in the road in Santo Domingo, so that the helicopters could see that they were civilians. At some point as she was lying on the road, she looked up at a helicopter and saw things that looked like rolls of white paper coming out of the helicopter. She said to her friends, "Look, the helicopters are throwing paper at us." Then she heard an explosion, everything turned dark, and she could not see anything.

She tried to run but could not; her arm did not respond. Everyone was screaming. They were there 15 or 20 minutes until someone came with a truck. Around 17 wounded people and some dead were loaded in the back of the open truck, which drove toward

Tame. As they were leaving Santo Domingo, some helicopters came close to the truck. One fired alongside it.

On cross examination, she stated that about five helicopters were flying and shooting around Santo Domingo on December 12. The fighting on December 12 and 13 was all around Santo Domingo. When she tried to leave the town after 6:00 a.m. on Sunday, the fighting and shooting were coming closer. On Sunday there were approximately seven helicopters near the town. She saw only one helicopter drop what looked like paper. The helicopters, including that one, were moving. When she was in the back of the truck leaving town, no one was hit by firing from the helicopter. The helicopter followed the truck for several hundred meters.

In response to questions from the Tribunal, she stated that those in the helicopter must have known that the people in the town were hit by one or more bombs, because they were low enough that you could see them very clearly. It would also have been obvious to those in the helicopters that the people in the back of the truck were wounded. There were no guerrillas living in Santo Domingo before December 13. She believed soldiers were in the helicopters, because in Colombia they, not the guerrillas, are the ones who have helicopters. She told a government investigator in Saravena that she had been injured by something coming from a military helicopter, but was not contacted again.

(C) Witness 3: Witness three was a resident of Santo Domingo on December 13, 1998. Early that morning she got up to cook breakfast for several people, including children in the family. Immediately before the explosion, she was standing right at the door of her home because the children were sitting just inside. She heard someone on the street yell, "They threw like some papers." Just then she went to put wood on the stove and everything went dark. Then she heard the children cry for help. Three little girls died that day. Someone on a motorcycle took the little boy to try to get medical care, but he died the next day.

She observed a truck leave Santo Domingo with wounded people. Helicopters flew over the truck and were firing close to it. Someone in the truck was waving a white T-shirt.

She left Santo Domingo that day and did not return for two months. When she came back, everything in her home was destroyed. They found holes in the ground with some of their things buried.

There were no guerrillas in Santo Domingo on the morning of December 13, and none live there. She saw no one in the town wounded by bullets that day; the children in her home were not wounded by bullets.

On cross examination, she stated that she did not see a helicopter drop a bomb, because she was inside her house, as were the children who died. Her house is located very close to the truck which the military says exploded.

In response to questions from the Tribunal, she stated that at no time did the government offer any assistance to her or her family for the loss of her home. There had been no previous problems with the military in Santo Domingo. She saw the helicopters and heard the shooting on Saturday, December 12. She was terrorized and expected that there would be trouble on the 13th.

(D) Witness 4: Witness four was a resident of Santo Domingo on December 13, 1998. On December 12 he left town to go to his father's farm about 800-1000 meters outside town, because there was fighting and firing, and his mother was worried for his brothers who were at the farm.²⁹ On Sunday morning the 13th he could hear combat at a distance, but could not see it.

At about 9:45 a.m. he could see a helicopter flying around, heard an explosion, and saw smoke coming out of the helicopter. He told his brother, "They bombed Santo Domingo, I'm leaving." He was concerned because his mother and father were still in Santo Domingo. On his way into town, he met people leaving Santo Domingo, who said they had been bombed and that his father was wounded. They did not say that a car exploded.

As he was trying to get into town, dressed in white and unarmed, a helicopter fired on him. He understood the helicopters were from the Colombian Air Force. He has "never" been a guerrilla. He was unable to get into Santo Domingo that day, and drove by car instead to Caño Verde. A plane followed and fired at them.

On December 14 he learned by phone that his mother was killed in the explosion along with other members of his extended family. That afternoon he went back to Santo Domingo and found her and other family and friends dead. The army was not in Santo Domingo at that time.

Their house is a grocery store with grain and had a lot of merchandise because of the bazaar and the season. On December 14 everything was in order. He did not return to Santo Domingo until around December 26. By then the doors had been opened and things taken out. Some things were on the ground, a lot was missing. He found bags inside which said for the exclusive use of the Colombian armed forces.

On cross examination, he stated that he saw several helicopters on the morning of the 13th, but only one with smoke coming out. Asked if he saw combat around Santo

²⁹Witness 4 states that he grows papaya, not coca.

Domingo on the 13th, he answered that he heard it, in the mountains. He did not know if it was closer than on the 12th.

In response to questions from the Tribunal, he stated that his mother expected trouble on the 13th because they could hear the combat on the 12th.

B. Survivor Testimony in Army Court File³⁰

73. In addition to the four survivors who testified before the Tribunal, the file of the preliminary inquiry by the army investigating judge, placed into the record of the Tribunal, contains statements taken by army judges from ten survivors, all in Tame or Arauca, during the first ten days after the event. (Exhibits V-21, (1) through (10).) One of those ten (V-21.2) also testified before the Tribunal (Witness 3).

74. All stated they were present in Santo Domingo at the moment of the explosion on the morning of December 13, 1998. All are civilians, either farmers, housewives, or youths who had come to Santo Domingo that weekend to play in a soccer match. All but one (a 15-year-old) are adults, ranging in age from 19 to 57, men and women. All but one have primary education or describe themselves as literate. Each identified family and friends who were killed or wounded in the explosion.

75. Their testimony is consistent among each other, and with the survivors who testified before the Tribunal, on the following material points:

(a) The explosion occurred between approximately 9:00 a.m. and 10:00 a.m. on the morning of Sunday, December 13; most say between 9:30 and 10:00. (Ex. V-21.2, 3, 4, 5, 7, 8, 9.)

(b) Prior to the explosion, on the 12th and 13th, there had been combat between the military and guerrillas near, but not in Santo Domingo. (V-21.1, 2, 3, 10.) Most were not sure how far away the combat took place; one said gunshots could be heard "at approximately 1000 meters in the mountainside" (V-21.3); another places the combat at a distance of 2 or 3 kilometers (V-21.2); another said the fighting "seemed far away near Caño Verde" (V-21.10).

(c) Prior to the explosion, there were no guerrillas in Santo Domingo. (V-21.2, 3, 5, 6, 7, 8, 9.) On this point, the witnesses resisted leading questions from the military judge, who claimed that other information supposedly placed guerrillas in combat inside the hamlet. Some resisted emphatically. One responded, "No, that is a lie." (V-21.2) Another: "It was a huge lie that there was any guerrilla" (V-21.5). And another: "There were no guerrillas there in that hamlet. It's a pure lie." (V-21.8.)

³⁰The Tribunal has received what purports to be a complete copy of the file of the army court's preliminary investigation, with sequentially numbered pages, and has no reason to doubt its authenticity.

(d) Prior to the explosion, there were no uniformed people of any kind in Santo Domingo, whether guerrillas, military or police. (V-21.3, 5, 7, 9.)

(e) Prior to the explosion, there was no firing by guerrillas from Santo Domingo. (V-21.1, 2, 5.)

(f) Before the explosion, a number of townspeople went out into the street in order to show that they were civilians. (V-21.5, 7, 10.)

(g) Several witnesses saw a helicopter drop from one to four bombs (V-21.3, 5, 8), or an object that looked like little balls or papers (V-21.10), or emit streams of smoke (V-21.6, 7) over the town, immediately before the explosion. One described the helicopter as a "large green helicopter with little horns" (V-21.5); another as a "black-like helicopter carrying some tubes on each side" (V-21.6).

(h) The explosion caused the deaths and injuries. (V-21.1, 2, 4, 10.) No one testified to any deaths or injuries caused by bullets; one affirmatively declared that there were no human casualties from bullets (V-21.3.)

(i) No one testified to the truck exploding on its own. One witness saw the bomb fall in the pavement, "or the street at the side of an old truck parked there." (V-21.3.) Another, asked about the "red truck set afire by the guerrillas," answered, "The vehicle exploded from the bombs dropped by the military." (V-21.8.)

(j) When a small truck carried the dead and wounded toward Tame, helicopters fired alongside it for some distance. (V-21.2, 4, 7, 10.)

76. Not all witnesses testified to each point, nor were they all asked the same questions. However, none of the points summarized above was contradicted by any survivor witness in their statements before the army judge or the Tribunal.

77. The army court file also contains statements by six survivors, given on December 16 and 17, 1998, to the municipal Human Rights Ombudsman of the city of Tame. One also gave a statement to the army judge which is included in the summary in par. 75 above. Their statements to the Ombudsman are consistent with the statements given by survivors to the army judge (par. 75 above).

C. Helicopter Pilot Testimony

78. The evidence summarized below indicates that seven Colombian Air Force aircraft – three planes and four helicopters – were involved in the operation around Santo Domingo on December

12-13, 1998. The helicopters were a UH-60, another UH-60,³¹ a UH-1H, and an H-500. The pilots of all four were interrogated by Colombian military courts, the first by an army judge on December 24, 1998, and the other three by air force judges (accompanied in one instance by a civilian prosecutor) on February 7, 8 and 9, 1999.

79. The first helicopter pilot to testify was an Air Force Captain who piloted a UH-60 Black Hawk helicopter on December 13, 1998. On December 24, he told an army judge the following:

(a) On the morning of Sunday, December 13 "we heard that there were four casualties in the troops and one minor officer had been killed." The crews from the helicopters in the operation met early Sunday morning at Caño Limón to plan the transport of more troops to the combat area near Santo Domingo. There were four helicopters: a UH-60, an AH-60 [sic], an H-500 and a UH-1H (number FAC 4407).

(b) They took off for the combat area at 9:00 a.m. Finding their troops under attack from the brush outside Santo Domingo, they used their weapons to soften enemy positions. The UH-60 carried machine guns, the AH-60 rocket launchers and machine guns, and the H-500 a rocket launcher, machine gun and a "perch for cluster bombs." The UH-1H had cluster bombs. The cluster bomb "is a multiple charge that produces a fragmented explosion as its desired anti-personnel effect."

(c) The operation lasted from 9:30 a.m. to 11:00 a.m. On December 13 the UH-1H dropped two cluster bombs. The first was dropped over the brush approximately 500 meters from Santo Domingo. The second "went hot, firing into the brush to the east end of the drop zone," which was "located some 5 or 6 kilometers from the town."

(d) At no time were civilians targeted, nor was there any explosion or smoke inside the town during the operation.

(e) A video taken by an air force Cessna 185 equipped with TV and infrared cameras was sent to the air force command. It shows that the air support took place over woods and brush, not over Santo Domingo.

(f) It is "very probable" that Santo Domingo was flown over. But that would not mean firing on the town, since machine guns and rockets require some distance for a proper trajectory. He then added, "The only weapon that the helicopters have that depends on gravity is the cluster bomb, which was carried by the UH-1H, which dropped two bombs ..."

³¹Two of the pilots refer to an AH-60 helicopter. It is unclear whether this is a typographical error or perhaps another designation for the same helicopter. US Ambassador Kamman's December 30, 1998 letter (par. 96 below), based on information from the Colombian Air Force, lists the four helicopters as a "UH-60A, a UH-60L, a UH-1H, and an H-500ME".

(g) The civilian deaths in Santo Domingo were "probably caused by the crossfire." Also, news reports showed that the truck blew up "because of a charge placed underneath ... you can see that the explosion caused damage from the ground up."

(h) Asked if he saw civilians go out on the road in Santo Domingo, he answered, "I don't know at what time exactly. I personally did not see because I was far away unloading troops, but I did hear reports from the other aircraft that they could see the population go out onto the highway that connects Santo Domingo with Tame. They were on foot and on vehicles heading west, but at no time were they considered military targets by the armed aircraft."

80. The second pilot to testify, before an air force judge on February 7, 1999, was an Air Force Major who piloted a UH-60 (Blackhawk) helicopter on December 13, 1998. Part of the interrogation was joined by a civilian prosecutor who also asked questions. The Major stated as follows:

(A) He entered operations around Santo Domingo as an escort aircraft to provide air support to the ground troops of Counterguerrilla Battalion 36, at about 10:00 a.m. on December 13. The situation was "quite critical" due to the deaths and wounding of the troops under constant pressure from the guerrillas. The combat was near where the guerrilla drug plane had landed the day before, about 1800 meters from the town of Santo Domingo. It is difficult to be precise but the combat was "quite removed" from the town.

(B) In another answer he stated that at some point on December 13, there was heavy combat in three places, one 400 meters from the town, and the other two about 1.5 kilometers from the town.

(C) The guerrillas hid in the brush and that is where all fire was directed; targeting was directed by troops on the ground.

(D) "Visibility at the time of the operation was excellent, greater than 10 kilometers. It was at its maximum capacity of visibility, therefore we could easily identify the civilian population." Moreover, "the terrain in the area is perfectly flat which permits easy operation of the helicopters."

(E) He never shot at the town of Santo Domingo; it was against air force rules to shoot at homes. Nor did he ever shoot at the civilian population "because they can be easily identified, and because of the low velocity of the aircraft, the aiming errors are minimal."

(F) At 10:00 a.m. on December 13 he observed about 50 people in civilian dress walking on the highway and some vehicles; "they could be seen clearly." "In the moment of the combat civilian personnel could be seen on the highway outside the houses walking slowly, which seemed strange to me because combat had occurred the day before and in general the civilian population leaves conflictive zones ..."

(G) The civilian prosecutor asked him what he could say about the testimony of a young woman who said that she saw one of the helicopters drop four or five "black stars," and then heard an explosion and fell with her shoulder destroyed. He answered that the UH-60 fired rockets and machine gun bullets at high velocity, too swift to be seen by the naked eye. "In contrast," he added, "the weapon described by the informant is the typical behavior of a bomb which - I do not know if any other helicopter fired them."

(H) The civilian prosecutor then asked what arms or explosives did the helicopters in the operation fire? He answered that they fired machine guns and rockets "and I really do not know if some helicopter fired some other type of armament ..."

(I) Asked what other helicopters participated in the operation and what arms they fired, he answered a UH-60 Blackhawk, a UH-1H, and an H-500 that did not use bombs, "and I do not know if another aircraft used that type of armament."

(J) The civilian prosecutor stated that many civilians say that civilians including children were killed by firing from helicopters which dropped bombs on Santo Domingo, and asked what he could say? He answered that "if it were true, it would have to be a bomb since it is typical for that type of armament to cause such damage. Nevertheless there would have had to be damage to installations and homes, which does not confirm that these facts are true, because as the informant says the combat we were carrying on was outside the town and it is very difficult for an aircraft to have made a mistake over so long a distance as to cause this. Bombs generally are used by combat airplanes, and as far as I know they were not used in the course of the confrontations. In addition the combat took place outside the town, as the informant says. I know only that the only airplane which overflew the town was the plane which filmed everything and that was a small plane and only has a video camera and does not have any kind of armament."

(K) He did not see any explosions in Santo Domingo. On the evening of December 13 the guerrillas set fire to the gas station. He also saw a red truck unusable due to an explosion. "Apparently the subversives put a bomb in the motor to try to blame the military forces, because it's practically impossible that so much damage like this can be done from an aircraft without damaging the nearby homes." He did not see the truck explode. If a rocket or bomb had hit the motor, it would totally destroy it and the adjacent pavement and houses."

(L) He saw five guerrillas at the entrance to the town shooting at us constantly, "and these facts did not seem to matter to the civilian population." At another point in the interrogation he stated that he saw three guerrillas by the gas station at one end of town, and three more at the other end of the town, at the exit to Bedoyes. He also saw guerrillas in the town on December 15.

(M) On the afternoon of December 13 he saw a truck carrying the bodies of approximately four civilians, or persons dressed as civilians, leave Santo Domingo in the direction of

Betoyes. It was "strange that they took the bodies from a home that was never attacked or hit by the Colombian Air Force aircraft, which makes one presume that they had to transport the bodies to this site and that they were possibly executed by the guerrillas in retaliation for the capture of the brother of [a guerrilla leader] - maybe they thought that someone in the hamlet informed the authorities of the intention of the guerrilla drug plane ..." As sometimes happens, the guerrillas may have thought they were "informed on by *their own friends* and as retaliation they carried out massacres like the one in Santo Domingo ..." (Italics added.)

(N) The civilian prosecutor asked whether homemade bombs were carried in helicopters? He answered that they are not, that they are too risky, and that "what we use is a sophisticated armament, made in a factory and bought from the United States and military industry."

(O) He believes the army could not have shot at the civilian population on December 13 because the army did not get into Santo Domingo until three days later, although he added that one could not rule out the possibility of mortars or parabolic shots, since there was much use of these weapons, although he had no knowledge that any of them hit Santo Domingo.

81. The third pilot to testify was a Lieutenant who on December 13, 1998 piloted the UH-1H 4407 - the pilot who, together with his crew, was later formally accused of bombing Santo Domingo, by the civilian Prosecutor General and the civilian Attorney General. Interrogated by an air force judge on February 8, 1999, he stated as follows:

(A) His mission on December 13, 1998 was to transport troops, supplies and munitions in support of ground troops. His times of arrival in the combat zone depended on the requirements of the 18th Brigade (of the army).

(B) He used only cluster bombs. When dropped, a cluster bomb has an action radius of 100 meters. If it falls on the pavement it leaves a hole and several other holes nearby because it has six units. If it falls on a vehicle, it destroys it and can even turn it over.

(C) He dropped two cluster bombs on December 13, one between 10:30 and 11:00 a.m., and the other between 2:00 to 2:30 p.m. Both were dropped over brush and woods. At no time did he drop a bomb on Santo Domingo; the closest one fell at a distance of approximately one kilometer from the town.

(D) He dropped the first bomb "in accordance with the instructions of helicopter gunship H 500, FAC 4257." He dropped the second "in accord with the indications of helicopter gunship UH-60."

(E) On both occasions, after receiving the "instructions" from the helicopter gunships and locating the target, he carried out an overflight, checking that there were no houses or civilian population below. He activated the first bomb at about 10:30 a.m. At that site he saw no persons at all, only fire directed toward the troops. In response to a later question, he stated

that the only thing he saw at the 10:30 target were army troops leaving the site, and he saw nothing at the second site, repeating that both sites were areas of brush and woods. He saw no casualties resulting from the 10:30 bomb, only the "destruction of the brush."

(F) Asked if he saw any persons in Santo Domingo before the 10:30 bomb, he answered that he did not see people at 10:00 a.m., the only thing he saw were trucks and pick-up's leaving on the road to Tame.

(G) Asked if he saw the truck explode, he answered that he only saw smoke from the house burning at the curve of the road on the morning of December 14.

(H) Asked if he saw guerrillas in the town, he said that he had seen them in Santo Domingo at about 3:00 p.m. on December 13 and again on December 14, 15 and 16. He concluded, "The people we saw in the town shot toward the aircraft with long arms and toward the troops who were arriving at the hamlet."

82. The final helicopter pilot to testify was an Air Force Lieutenant who piloted a Hughes 500 helicopter on December 13, 1998. Interrogated by an air force judge on February 9, 1999, he stated as follows:

(A) On December 13, 1998 he piloted a Hughes 500 helicopter, FAC 4257. He escorted the transport helicopters. At 0620 he evacuated wounded from the combat zone near Santo Domingo. At 0930, after attending a briefing to plan an unloading mission, he returned to the combat zone along with an AH-60 [sic].

(B) He never shot at the civilian population or at Santo Domingo, nor did he see any member of the Air Force attack the civilian population in Santo Domingo. He always targeted sites in the brush and in places distant from houses and population. He chose some targets personally, and hit others in response to requests from troops, taking care to shoot far from the civilian town. The closest his rockets came to Santo Domingo was about 1000 meters.

(C) He did not hear any explosion in Santo Domingo nor see the truck explode.

(D) At a time which he did not specify, he saw armed persons walking with the civilians leaving Santo Domingo, using them as human shields. He repeatedly saw guerrillas among the civilian population.

(E) The armed forces follow international humanitarian law, he stated, but the guerrillas manipulate it to shield their illegal activities, as part of their legal and political war, to create a negative image of the military.

D. Statements of Other Air Force Personnel

83. On December 17, 1998, the air force liaison officer in Arauca (a Lieutenant) directed a report to Colombia's Chief of Air Operations (a Brigadier General), concerning air support provided to Counter guerrilla Battalion 36 in operation "Lightning 2" in the zone of Santo Domingo. Concerning December 13, the report states that a helicopter mission at 0630 evacuated wounded soldiers from the combat zone. The helicopters returned to Caño Limón and the liaison officer (the Lieutenant) went there to "direct the operation." At 0930 troop transport was initiated to two unloading points. One was 3 kilometers north of Santo Domingo, and the other 6 kilometers west of Santo Domingo. At the time of initial unloading of troops, the UH-1H fired a Cluster bomb which hit approximately 500 meters north of Santo Domingo in dense brush. The other Cluster was thrown before beginning the troop unloading six kilometers west of Santo Domingo.

84. Unlike the army court file, which the Tribunal appears to possess in its entirety,³² the portion of the air force court file in the record of the Tribunal, although substantial, is incomplete.³³ Statements of other air force witnesses in this portion of the file do not add materially to the statements of the helicopter pilots, with two exceptions:

(A) An air force sergeant in the crew of UH-60 helicopter 4123, which participated in the Santo Domingo operation on December 13, stated that target selection was done jointly "between ground troops by means of FM radio and us, and between us and the Skymaster [plane] by VHF communication and among the rest of the airships that participate" in the operation.

(B) An air force technician, interrogated on January 22, 1999, was shown a photo of an item recovered in Santo Domingo during initial inspections. He answered, "That image corresponds to the tail of a twenty pound cluster bomb." Such bombs are dropped in packages of six, he said. Asked if it was used by the air force at Santo Domingo, he answered, "It was not used because at that time we did not possess this type of armament." The "most probable" explanation, he said, was that it had been brought from somewhere else and placed at Santo Domingo.

E. Forensic Evidence

85. As noted above (par. 41), the initial forensic report by the Technical Investigation Corps (CTI) of the Prosecutor General's office, dated December 28, 1998, indicated that possibly a homemade explosive device caused the explosion in Santo Domingo.

³²See note 30 above.

³³The Tribunal has received what purports to be the initial portion of the air force preliminary investigation, with sequentially numbered pages, covering its initial months. The Tribunal has no basis to doubt the authenticity of this partial file.

86. In addition, during the preliminary military inquiries, various military forensic investigators reported finding no manufactured explosive devices or ingredients such as TNT. They suggested that small craters in the roadway in Santo Domingo were caused by grenades or mortars, or by burning some type of combustible, and that parts of cluster rockets found at the scene were too rusted and old to have been used in the incident.

87. However, as noted above (par. 45), on June 10, 1999, NHRU requested a new inspection and analysis by the National Institute of Legal Medicine and Forensic Sciences. On June 18, 1999, specialists in forensic ballistics and forensic photography from that Institute, visited Santo Domingo. The resultant December 10, 1999 report from the Institute's Forensic Ballistic Laboratory concluded, among other points, that the truck which allegedly contained the supposed car bomb, had in fact been hit from above, rather than exploding from within.

88. On April 28, 2000, CTI issued a new report (Ex. V-25), reversing the conclusions of its initial, December 28, 1998 report. The new report explained that the initial report had been prepared under time pressure, in the face of nearby combat. The new report was based on "various explosives and ballistics tests, new judicial inspections, detailed exploration of the site of the events, new discoveries and technical expert analyses." Among its conclusions were the following:

(A) "The fragments of metal recovered in Santo Domingo, around the site of the events, in the points of impact, in some dwellings, in the affected vehicle (truck) and in the necroscopies of some of the victims of the December 13, 1998 explosion, correspond to the ring or spiral of fragmentation which is produced by the AN-M1 A2 or AN-M158 bombs or air-land grenades of the device type CLUSTER, ... , just as other fragments recovered correspond to a part of the head or nose of the AN-M1 A2 or AN-M158 fuse, ..."

(B) There was "no difference" between the fragments recovered from the corpses of the victims and those found at the site of the events."

(C) Based on an inspection conducted on February 11, 2000, the truck "suffered the impact of an air-land explosive device with a spiral prefragmented in metal that fell on its top, and that in its explosion it gave off multiple fragments characteristic of said spiral; these fragments pierced the walls of the vehicle in distinct directions and in the shape of a fan, producing entry holes in the motor and exit holes towards its fenders and side doors."

(D) There were six points of impact, including one "on top of the truck," two on the pavement, two on the ground, and one on a dwelling.

(E) Taking into account the number of points of impact (six), the evidence gathered at the scene and the necroscopies, "these impacts or craters were produced by the 6 bombs AN-M1 A2 or AN-M158 which normally are thrown from an airship with the CLUSTER device."

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(F) Finally, the report "concluded that it is possible that these bombs, A1-M1 A2 or AN-M158, of the CLUSTER air-land device, ... , caused the damage or effects discovered in the dwellings of Santo Domingo, as well as the wounds to the victims that fell there, given the proximity or closeness of their bodies to these points of impact, ..."

89. Meanwhile, through the Legal Attache of the U.S. Embassy in Bogota, on March 24, 2000, NHRU sent several fragments to the FBI crime laboratory for analysis. On May 1, 2000, the FBI Laboratory issued a report. (Ex. V-1.) It concluded as follows:

(A) The fragments contained "exploded remains which are consistent with a twenty (20) pound United States designed AN-M41 fragmentation bomb and fuze. The resulting explosion from this type of bomb could cause property damage, personal injury or death."

(B) "The AN-M41 is a high-level fragmentation bomb and is designed to be dropped from a minimum altitude of 400 feet. This bomb is designed to function on impact utilizing an instantaneous nose bomb fuze. Upon impact, [t]he detonator explodes, ..."

(C) "This bomb was designed to be suspended individually or dropped as part of a cluster of six (6) bombs in the Cluster Adapter AN-M1 A2 or M-1."

(D) "Not present in any of the submitted specimens was any evidence of a improvised delivery system."

(E) The AN-M41 fuze has "NOSE BOMB FUZE" stamped on its body during its original production. One fragment forwarded to the FBI contained the "apparent partial letters NO_E BOM_."

90. In addition, the Tribunal heard the testimony of Mr. Barry Romo, a former U.S. army infantry officer in Vietnam, now a postal union leader in Chicago, who has been active in antiwar causes. In the army Mr. Romo was trained in small arms and explosives, served as a company commander and battalion staff intelligence officer, and worked closely with helicopter air support operations. According to his testimony, he visited Santo Domingo in the company of local residents during several daylight hours one day in June 2000.³⁴ He displayed to the Tribunal photographs he had taken of the hamlet, of the truck alleged by the military to be the source of a "car bomb," and of three indentations in the pavement, all of which he attributed to a small, manufactured, anti-personnel bomb dropped in small clusters. From the locations of the casualties, he stated, there was a minimum of three explosions, although they could occur in such rapid succession as to sound like only one. He examined the truck and found that the type of damage did not appear to result from

³⁴According to Mr. Romo, and as confirmed by his photographs, despite the passage of 18 months since the explosion in Santo Domingo, the truck remained in the same place on the road, indentations were still in the pavement, bullet holes still in the roofs of homes, shrapnel damage still found in wooden structures, and shrapnel fragments still recoverable.

explosives placed inside it: the engine was not blown down, the passenger area was not blown away, and there were no signs of homemade bomb fragments under the truck. The engine area appeared to have been hit with either a rocket or a bomb; the metal in the holes was "going in," not going out. He also recovered fragments of shrapnel from wooden structures at the scene; others were too deeply embedded in the wood to remove without damage. Asked what is the "strongest evidence" that the explosion was not from a homemade bomb, he answered that a homemade bomb would leave a different kind of shrapnel. In addition, he said, the pattern of shrapnel dispersion corresponded to a manufactured bomb, not a homemade bomb. With regard to the timing of the explosion, he could only rely on statements by townspeople that it was on December 13, 1998; he had no way to independently verify the date. Townspeople told him that helicopters had been firing into a tree line or jungle line about 200 meters from the town. He stated that there were no differences between his findings and those of the FBI report. On cross examination, he stated that to drop the sort of bomb he believes fell on Santo Domingo, a helicopter does not need to stop, but can be in motion.

F. Army Testimony

91. The army judge took statements during December 14-28, 1998, from the following personnel of Counterguerrilla Battalion 36: the Battalion Commander (a Major), several company commanders, several corporals and a dozen soldiers. He also took the statement of one staff officer of the 18th Brigade (a Major). His December 28, 1998 Order closing the inquiry without prejudice, states that its sole purpose was to consider the possible responsibility of members of Counterguerrilla Battalion 36. No officer ranking higher than Major was interrogated. The Battalion Commander is the same Major against whom the civilian Attorney General, in June 2000, opened a formal investigation for allegedly sacking the town.

92. The testimony of personnel of Counterguerrilla Battalion 36 is consistent on the following points:

(A) They were in combat near Santo Domingo on December 12 and 13, but never entered the town; at least one specified that he could not even see the town. Their testimony was summarized in the December 28, 1998 Order of the army judge, which found that "between nine thirty and ten in the morning, the time when the deaths of the civilians in the hamlet of Santo Domingo occurred, the troops of the national army were at a distance of more than two kilometers from the central area of the said village, in heavy combat against insurgents of the tenth front of the FARC."

(B) During this time, the guerrillas were in the woods and the brush; air support was directed toward the brush, not the town.

(C) At least two stated that they heard no explosions on the morning of the 13th.

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93. In addition, the Battalion Commander stated the following:

(A) During December 13-15 his troops fought outside the town. On the evening of December 15, he received an order to secure Santo Domingo, because the Commander of the Army would arrive the next day. At about 11:00 a.m. on December 16, the Battalion Commander and his men entered Santo Domingo. "En route, we engaged in conflict with the guerrillas on various sides - inside the town and outside it around 0830 hours."

(B) Upon entering Santo Domingo, he could tell that the truck that had blown up had been used as a car bomb, because there was no crater such as would have resulted from a rocket. The air force has a video, he added, in which you could "hear the detonation that was presumably the car bomb that went off early."

(C) On December 16 local public officials, accompanied by the press, came to inspect the hamlet and evacuate any civilians who might still be there. On December 17, military explosives specialists, supervised by the Inspector General of the Air Force (a General) and by the Commander of the 18th Brigade, inspected the truck. It "evidently seemed to have been booby trapped by the guerrillas for when the troops entered the town, but it must have gone off prematurely. The impact points are from the inside out ... " "You could also see from many of the houses that the bullet holes are from the inside out."

(D) On December 18 the Commander of the 18th Brigade returned with personnel from CTI, who inspected the area and took samples and statements.

(E) The Major and his men remained in Santo Domingo until December 22.

94. Another army Major, on the staff of the 18th Brigade ("B2"),³⁵ stated on December 27 that he was not involved in the operation but that, "according to the versions told by those people involved in that operation, the deaths were caused by FARC guerrillas during combat with troops of the Counterguerrilla Battalion 36 assigned to this Brigade. Their aim was to make national and international public opinion believe that the deaths were caused by the armed forces and view them as violators of human rights ..." Asked what type of weapons the air force helicopters carried on the morning of December 13, he answered, "from what I know," machine guns and rocket launchers. He did not mention cluster bombs.

95. One witness, describing himself as unemployed, claimed that the guerrillas treated him as a military or paramilitary informant or agent. He stated that "on the second day the guerrillas entered the town. That is when the guerrillas took the people outside and instructed them to signal to the troops not to fire. That is when the army began to fire. That is when there were all the deaths of civilians and children - when the guerrillas exploded a truck bomb and a few bottles of gasoline. I didn't see anything more than that was when the Fiscalia [civilian prosecutors] arrived to look

³⁵"B2" may refer to military intelligence.

around and pick up the wounded." He also "saw the army firing into the town. The guerrillas were among the homes." At the time of the explosion, he said, there were no military aircraft overhead, and guerrillas were inside Santo Domingo, dressed like police, "firing at the soldiers on the ground." (During the public hearing before the Tribunal, the Colombian attorney for the victims observed that this witness claimed to live nearby, was in the army involved with the 18th Brigade, and could not be found later.)

G. Embassy Letter

96. In response to an inquiry from U.S. Senator Patrick Leahy, then U.S. Ambassador to Colombia Curtis W. Kamman wrote to Senator Leahy by letter dated December 30, 1998. (Ex. V-8.) With regard to the events in Santo Domingo, Ambassador Kamman stated (pp. 1-3) as follows:

"... [T]he Embassy has not yet been able conclusively to establish the facts of the case. However, ... I wished to provide an immediate response ... as best we can so far."

...

"Citing the investigation's preliminary findings, the Colombian government vehemently denies that any indiscriminate use of military force took place. All versions agree that the civilian deaths happened during and in the context of a military clash between the armed forces and Fuerzas Armadas Revolucionarias de Colombia (FARC) fronts in the vicinity. According to the Colombian military command, the brunt of the clash took place six kilometers outside Santo Domingo -- not in the town, where the civilian casualties occurred. The government admits that its air force discharged a small number of rockets during the engagement, but has repeatedly denied that any Colombian Army units entered the town, or that any weapons were fired into the town by the Colombian military, at any time during the operation."

"As conveyed to the Embassy by the Colombian military, the investigation has yielded the following information and tentative conclusions: (i) a number of the civilian casualties appear to be the result of a FARC truck-bomb, probably intended for use against the Colombian Army, which exploded prematurely; ... (iii) with regard to bullet holes in the roofs of various town buildings, the direction in which the roof metal was splayed indicates that the holes were formed by FARC firing up at the Colombian Air Force from within the buildings, rather than by alleged machine-gunning from the air; and (iv) shell casings collected in the town are of Venezuelan manufacture and a caliber used by the FARC, not by either the Colombian Army or Air Force."

"Among the briefings and evidence which we have received from Colombian officials is a copy of an airborne surveillance video of Santo Domingo covering 0630-1130 hours the morning of December 13. A number of villagers, including the mayor, have publicly alleged that the Air Force 'bombed' the town at 0945 hours on December 13. The video, which numerous Embassy officers have watched, appears to show the village intact during that

entire time period, directly refuting this accusation. We are subjecting the video to further in-house professional assessment."

"Separately, a Colombian journalist who visited the site on December 16 has informed an Embassy officer that initial accounts in his publication and other media blaming government forces were based purely on hearsay, and that his own on-the-spot observations tended to bear out the government's version of events."

...

"... Our preliminary assessment, ... , is that the Colombian military's evidence has credibility."

97. Ambassador Kamman added that, "based upon data provided by the Colombian Air Force," seven of its aircraft were "involved in the December 12-13 operation:" three airplanes (one AC-47T and two OV-10A) and four helicopters (a UH-60A, a UH-60L, a UH-1H, and an H-500ME). According to information from the U.S. Military Group in Bogota, these aircraft belong to three different units: the three planes and the UH-60L helicopter are with Comando Aereo de Combate No. 2; the H-500ME and the UH-1H helicopters are with Comando Aereo de Combate No. 1; and the UH-60A helicopter is with Comando Aereo de Apoyo Tactico No. 2. (Ex. V-8, p. 3.) (In English, respectively, Air Combat Command No. 2, Air Combat Command No. 1, and Air Tactical Support Command No. 2.)

H. Lists of Victims and Causes of Deaths and Injuries

98. Counsel for victims presented a list of 17 civilians killed in the December 13, 1998 explosion at Santo Domingo. (Ex. V-26.) Six were children. All the adults were farmers or housewives. They are as follows:

Jaime Castro Bello, age 4
 Luis Carlos Neite Mendez, age 5
 Edna Maragarita Abello Tilano, age 5
 Deysi Catherine Cardenas Tilano, age 7
 Oscar (Jorge) Esneider Vanegas, age 13
 Yohanny Hernandez Becerra, age 16
 Nancy Avila Castillo (Abauza), age 20
 Luis Enrique Parada Ropero, age 21
 Arnulfo Arciniegas Calvo, age 23
 Carmen Antonio Diaz Cobo, age 23
 Luis Orlando Martinez Carreño, age 25
 Pablo Suarez Daza, age 26
 Edilma Leal Pacheco, age 27
 Rodolfo Carrillo Mora, age 27
 Maria Yolanda Rangel, age 35

Teresa Mojica Hernandez de Galvis, age 42
 Salomon Neite, age 58

99. Official death reports by a police inspector, contained in the military court file, state that he inspected the bodies of six of these victims in Caño Limón on December 13, 1998, between 2:00 p.m. and 3:00 p.m.³⁶ With regard to cause of death, each report states, "The community states that the deceased was killed by a bombing carried out by the air force of the national army." Autopsy reports on nine other victims (Ex. V-22) indicate the cause of death for each as an explosion or explosive artifact. None reports gunfire or bullets as cause of death. The autopsy report on another victim, four-year-old Jaime Castro Bello, contained in the military court file, concludes that his death was due to "multi-traumatic shock, secondarily to multiple visceral trauma, secondarily to wound by an explosive element."

100. A letter from the municipal Human Rights Ombudsman of the city of Tame, near Santo Domingo, dated December 14, 1998, to the UN High Commissioner for Human Rights and to the National Human Rights Ombudsman, contained in the military court file, includes a list of dead and wounded as a result of the alleged bombing of Santo Domingo. In addition to the dead,³⁷ the report identifies nine wounded taken to hospitals in Saravena and Arauca and twelve wounded taken to a hospital in Tame. Among these 21 wounded were at least nine children, of whom one was age four, one age 7, one age 8, one age 11, three age 15, and two age 16. A December 28, 1998 report from another hospital in Tame, also in the military court file, lists one additional adult as having been treated at the hospital. The same report, referring to the 13 patients treated at hospitals in Tame, states that "the patients presented with light wounds, occasioned by shrapnel apparently from an explosive artefact."

VIII. EVIDENCE ON INVESTIGATIONS AND LEGAL PROCEEDINGS

101. The official investigations and legal proceedings on the events at Santo Domingo were summarized in the discussion of exhaustion of domestic remedies in part V above. To that discussion only a few additions are noted here. A Colombian attorney for the victims testified before the Tribunal on the phases of criminal proceedings in Colombia, and specifically on the proceedings in the Santo Domingo case. Within hours of the explosion, the police commander of Arauca announced that 15 guerrillas and one soldier had been killed. Soon afterward an army commander issued a statement contending that civilians were killed while being used as human shields by guerrillas.³⁸ There were then three preliminary investigations: one by the army, closed without

³⁶"Witness One" testified before the Tribunal that he took six bodies to Caño Limón in his truck, after leaving Santo Domingo on the morning of December 13, 1998. (Par. 72 above.)

³⁷The letter corroborates the death of all but one (Carmen Antonio Diaz Cobo) of the seventeen victims listed in Ex. V-26. An autopsy report dated December 14, 1998 confirms the death of Carmen Antonio Diaz Cobo.

³⁸The lawyer also identified one witness who gave a statement to the army, and who claimed to live nearby, and was involved with the 18th Brigade of the army, but could not later be found.

prejudice shortly after the event; one by the air force, closed without prejudice on May 20, 1999; and another by the civilian prosecutor.

Although initial forensic tests led civilian prosecutors to doubt the testimony of the townspeople that the military was responsible, later tests led them to open a full investigation of military personnel. However, the civilian prosecutor remanded the case back to the air force judge. Although a new law requires civilian court jurisdiction over military personnel accused of genocide, torture or forced disappearances, these crimes were not committed in Santo Domingo, and the new law has not been applied to this case.

There is also a disciplinary case pending against a helicopter crew accused of bombing Santo Domingo and an army officer accused of responsibility for sacking. However, the ordinary punishments in such cases are minimal or insignificant.

On cross examination, he stated that the victims have filed numerous complaints with the authorities in the case, but could not recall the dates. He recalled that he filed one complaint within the last year. While the criminal proceedings have been pending, the victims have not yet attempted a "contentious administrative proceeding" to seek damages from the government, or a *tutela* legal action to challenge the civilian prosecutor's remand of the case to the air force court.

In response to questions from the Tribunal, he stated that a *tutela* action would be difficult, because it would entail asking a judge to overturn the decision of another judicial officer in a case in which the judge is not involved. Victims cannot intervene in the disciplinary proceeding; the only other legal action they could initiate is a "contentious administrative proceeding."

102. On December 30, 1998, Ambassador Kamman stated in his letter to Senator Leahy (p. 1):

"... I can assure you that the Colombian government is treating the incident with the utmost seriousness. The Colombian Air Force Inspector General, in cooperation with the Technical Investigation Corps (CTI) of the civilian Public Prosecutor's Office (Fiscalia), has already conducted an on-site investigation of events in and around Santo Domingo in the period December 11-13. The evidence they collected has been turned over to the Fiscalia, whose responsibility it now will be to determine whether any charges should be brought against any party."

103. On December 24, 1998, the army investigating judge wrote to the Inspector General of the Air Force, asking for detailed information on "rockets, munitions, and *other war material* used in the helicopters" at Santo Domingo. (Italics added.) Among other information, he asked for descriptions of the class and type of rockets "and explosives" used, as well as any other useful information. On December 29, the Air Force Inspector's office replied, detailing only rockets and munitions. It made no mention of cluster bombs.

104. On January 12, 1999, the Inspector General of the Air Force (a Major General) sent the air force judge a "Report of Results of Preliminary Investigation of the Air Operation in the Area of

Santo Domingo, December 12-15, 1998." The Report states that troop unloading began at 10:00 a.m. on December 13, at a point 3 kilometers north of Santo Domingo, with support from one H-500 and one UH-60 helicopter, firing rockets and machine guns. In recounting the air operation on December 13, the Report does not mention the other unloading zone (6 kilometers west of Santo Domingo), the other UH-60 helicopter, the UH-1H helicopter, or the cluster bombs. On the contrary, the report states, "The airships of the Colombian Air Force did not use bombs. The use of this armament requires special authorization from the Commandant of the Air Force, which did not exist."³⁹ The report concludes that the explosion of the truck was caused "by an explosive with metal placed in the engine."

105. A radiogram dated February 9, 1999 from the Commandant of Air Combat Command No. 1 (a Brigadier General), sent to the air force judge, stated that on December 13, 1998, a UH-1H dropped 2 cluster bombs between 0540 hours and 1605 hours.

IX. PUBLIC STATEMENTS BY MILITARY OFFICIALS

106. In a December 13, 1998 letter faxed to the Red Cross, the Commandant of the 18th Brigade of the Colombian army (a Brigadier General), accused the guerrillas of using the civilian population of Santo Domingo as "human shields" and later ordering their accomplices to denounce "indiscriminate bombing" by the Air Force to the press and to human rights organizations, to create a negative image of the armed forces. In a second letter faxed to the Red Cross that same day, he accused FARC guerrillas of "using the civilian population as shields after forcing them under armed intimidation to evacuate their homes, and proceeding to shoot against the military units, placing the population between their arms and their objectives, as a result of which it is presumed that there exists an elevated number of victims among the unarmed civilian population."⁴⁰

107. On December 15, 1998, a leading Colombian newspaper reported that "the commandant of the Colombian Air Force, General Héctor Fabio Velasco, assured that, according to the version of the pilots who were in the operations in Tame, the troops were under fire, but never bombed the civilian population." The newspaper quoted General Velasco as saying, "They shot from the mountain, two

³⁹The request may have been made. The December 17, 1998 report of the air force liaison officer to the Chief of Air Operations (see par. 83 above), immediately prior to reporting the two cluster bombs dropped by the UH-1H helicopter on December 13, stated, "Due to the situation of the quantity of bandits and the jungle zone without nearby population, *I made the request to the Brigade to solicit from the general command authorization for a Beta support* for the place of the armed contact, having as forward air controller the Arpia in the zone; but when the T-27's arrived they could not precisely locate the place because both the troops and the guerrillas were dispersed and moving closer to the populated area of Santo Domingo." (Italics added.) The report does not state whether the Brigade requested authorization or, if so, whether the general command gave it.

⁴⁰Both letters are in the army court file.

of our helicopters were hit and they responded with machine gun fire and fired six rockets. At no time did they use bombs." *El Tiempo*, Dec. 15, 1998, p. 8A.⁴¹

108. On December 17, 1998, another leading Colombian newspaper reported that General Velasco "yesterday assured that the airships which participated in the operation in Santo Domingo were not equipped to carry heavy artillery, and that the only helicopter donated by the U.S. – that also participated in the operation – was a UH-1H that served only to transport soldiers." *El Espectador*, Dec. 17, 1998.

109. On December 23, 1998, the same newspaper quoted General Velasco as stating, "All this is a show by the guerrillas." The General "explained as well that none of the airships used in Santo Domingo had the capability to drop bombs, and he clarified that in this sector there was only machine gunning over mountainous zones." *El Espectador*, December 23, 1998, p. 12-A.

110. In the September 23, 2000 public hearing, the defense presented an approximately half-hour video, produced by the Colombian military, entitled, "The Great Truth About Santo Domingo." In summary, the narration contends as follows: The combat near Santo Domingo began with the military interception of a guerrilla drug transport plane, which landed and unloaded on a highway. At the time of the explosion on December 13, ground combat was six kilometers outside Santo Domingo. Even though some guerrillas took up positions inside the town, neither the army nor the air force attacked them, so as not to harm civilians. At 10:39 a.m., the military began to move toward Santo Domingo. Upon arrival, they found the scene of a massacre caused by a guerrilla truck bomb intended for the military, but which exploded prematurely. The video then shows interviews of a local Mayor and two witnesses who accuse the military of the bombing, followed by denials by high military officials. Aerial film footage then appears of an unidentified town, and then of alleged guerrillas in Santo Domingo (as the date track shows December 16, 1988). The video concludes with news coverage of military claims that what happened at Santo Domingo was a show mounted by the guerrillas.

111. At the September 23, 2000 public hearing, the Tribunal accepted an offer of proof from counsel for the victims that Mr. Romo, if recalled to testify, would dispute various factual assertions in the video. The Tribunal also accepted argument by defense counsel, disputing some of Mr. Romo's contentions.

X. EVIDENCE ON BROADER CONTEXT OF HUMAN RIGHTS AND VIOLENCE

A. Victims' Evidence On Human Rights Violations in Arauca

112. Two community leaders from the Department of Arauca, one a labor leader and the other the leader of a non-governmental human rights organization, testified together as a panel before the

⁴¹Newspaper clippings may be considered to the extent they "contain public and well-known facts," or "textually reproduce public statements, especially those of high-ranking members of the Armed Forces [or] of the Government," or "as a whole insofar as they corroborate testimony ..." (*Velásquez Rodríguez*, par. 146.)

Tribunal. In substance, their testimony was that there had been a pattern of extrajudicial executions and gross violations of human rights, including at least one massacre a few weeks before the events at Santo Domingo, committed in recent years in Arauca by members of the military, often operating with or as clandestine members of paramilitary groups. There was also a pattern of impunity in the State's response to these cases.⁴²

B. Victims' Evidence On Human Rights Violations in Colombia

113. A Catholic priest who is an expert on human rights violations in Colombia testified before the Tribunal. In substance, his testimony was that there had been a pattern of gross violations of human rights, including massacres and extrajudicial executions, committed in recent years in Colombia by members of the military, often operating with or as clandestine members of paramilitary groups. There was also a pattern of impunity in the State's response to these cases.⁴³

114. Reputable international human rights monitors report as well:

(A) Amnesty International: Amnesty's 1999 report on Colombia states, "More than 1,000 civilians were killed by the security forces or paramilitary groups operating with their support or acquiescence." Amnesty reports a paramilitary attack which killed 18 civilians; the government took no action to prevent it or to provide protection, despite receiving numerous warnings of an impending attack. Amnesty adds, "Investigations into links between the armed forces and paramilitary groups increasingly implicated senior army commanders."

(B) Human Rights Watch: Its annual report on Colombia in 1999 states, "Paramilitary groups working in some areas with the tolerance and open support of the armed forces continued to massacre civilians, ..." Noting data attributing 78% of human rights and humanitarian law violations in 1999 to paramilitaries, 20% to guerrillas, and 2% to State forces, Human Rights Watch observed, "However, the percentage does not reflect state forces that routinely assisted paramilitary atrocities. Indeed, cooperation between army units and paramilitaries remained commonplace."

(C) U.S. State Department: Its 1999 Country Report on Human Rights Practices in Colombia states, "The security forces regularly failed to confront paramilitary groups, and members of the security forces sometimes illegally collaborated with paramilitary forces. The armed forces and the police committed numerous, serious violations of human rights throughout the year."

⁴² A more complete summary of the testimony of these witnesses will be included in Appendix A to this Judgment.

⁴³ A more complete summary of the testimony of this witness will be included in Appendix A to this Judgment.

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"The Government's human rights record remained poor; there was some improvement in several areas, and the Pastrana administration took measures to initiate structural reform, but serious problems remain. Government forces continued to commit numerous, serious abuses, including extrajudicial killings, at a level that was roughly similar to that of 1998."

C. Defense Evidence on Context of Violence

115. Professor Frank Safford of the History Department of Northwestern University, an expert on Colombia, reviewed the history that led to the present situation, in which the government is effectively unable to control violence from paramilitaries, guerrillas or even its own military. He explained that Colombia has been a "living horror" for most of the period since 1948. From 1948 to the mid-1960's, the country endured a complex civil war, which began as a political war between the two principal political parties, Liberal and Conservative, but degenerated into various forms of rural banditry. In the mid-60's, ideologically oriented guerrilla groups began to emerge. One of these, the FARC (Fuerzas Armadas Revolucionarias de Colombia), was an outgrowth of an earlier peasant defense group.

Although guerrillas controlled some territory, the army gained the upper hand in the 1970's. However, the government suffered setbacks in the 1980's, as it confronted the rising power of drug lords capable of intimidating and corrupting large portions of the governmental system, including the judiciary. The war between the government and the drug lords reached its zenith in the late 1980's when the government agreed to extradite persons charged with drug offenses to the United States. That led to the "extradition wars." In order to fight extradition, the drug lords carried out a campaign of terror against judges, police officers, the government and the citizenry, bombing shopping centers and in one case an airplane. The "extradition war" ended both with the killing of several violent drug lords, and with a government ban on extradition of Colombian nationals to the U.S.

Today Colombia faces a wartime situation not remotely similar to anything in the U.S. Public order hardly exists in rural areas. In the last five years coca cultivation was pushed out of Peru and Bolivia, and into southeastern Colombia and other parts of the country. This created an opportunity for guerrillas to acquire large sums of money through imposing "taxes" on coca cultivators, as well as by kidnappings and extortion. With their new wealth the guerrillas have been able to purchase more effective small arms weaponry than possessed by the army. Guerrillas now control at least forty percent of the national territory, and there are few parts of the country where they do not have at least partial control of the countryside. The two groups now most active and effective in fighting in the countryside are the paramilitaries and the guerrillas, while the army is relatively defensive and passive. The paramilitaries and guerrillas are both extremely violent, and the peasants are caught in the middle.

Professor Safford does not see a radical change in Colombia's human rights situation under President Pastrana. Despite the President's good intentions, there are many centers of power in Colombia that are not under the government's control.

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Although he does not have detailed knowledge of the Santo Domingo case, it must be understood that in battles between guerrillas and the army, civilians are going to be killed. Both guerrillas and paramilitaries have committed massacres of civilians and other human rights violations. The guerrillas, unlike the paramilitaries, gain some public sympathy because they have social goals. However, the guerrillas have little public support. The case of Santo Domingo must be understood in this broader context.

The military has been effectively autonomous from the government for decades. The national government is in the position of having to negotiate with the military, if it wishes to sanction military officers for abuse of human rights. There is some indication that the military is making at least partial attempts to improve its human rights performance.

On cross examination, Professor Safford agreed that as Colombia's government has become more dependent on the U.S. government, it is under greater pressure to avoid the appearance that it is responsible for human rights violations. The military at least tacitly acquiesces, and in many cases actively cooperates with paramilitaries. There have been cases where the Colombian government attempts to shift blame for its human rights violations to the guerrillas. Regardless of the intentions of President Pastrana, the government has little ability to affect the military's human rights record.

In response to questions from members of the Tribunal, Professor Safford discussed issues of social injustice and corruption in Colombia, prospects for peace negotiations and U.S. military aid. Asked whether substantial international pressure strengthens the government's hand with respect to the military, he answered that it probably does, although it is difficult to say by how much.

116. Reputable international human rights monitors report as well:

(A) Amnesty International: Amnesty's 1999 report on Colombia states, "Armed opposition groups were responsible for numerous human rights abuses, including deliberate and arbitrary killings ..."

(B) Human Rights Watch: Its annual report on Colombia in 1999 states, "Guerrillas also flouted international humanitarian law, executing and kidnapping civilians and carrying out indiscriminate attacks. ... [T]he FARC continued to flagrantly violate the laws of war."

(C) U.S. State Department: Its 1999 Country Report on Human Rights Practices in Colombia states, "The Government continued to face a serious challenge to its control over the national territory, as longstanding and widespread internal conflict and rampant violence – both political and criminal – persisted. The principal participants were government security forces, paramilitary groups, guerrillas, and narcotics traffickers."

"According to the human rights Ombudsman's office, there were 399 massacres [3 or more persons killed outside of combat] ... during the year."

"The State demonstrated an increased willingness to remove from duty security force officers who failed to respect human rights, or ignored or who were complicit in the abuses committed by paramilitary groups. The Government removed four army general officers from service during the year; the generals were under investigation for collaborating with or failing to combat paramilitary groups." Among criminal cases transferred from military to civil courts in 1999 were three full colonels - "the first time that the military judiciary turned over cases concerning several high-ranking officers." However, the case against a Brigadier General in connection with a paramilitary massacre of "dozens of persons" was kept in military courts.

"The FARC ... regularly attacked civilian populations, committed massacres and summary executions, ..."

XI. EVIDENCE ON ROLE OF UNITED STATES

117. On December 30, 1998, Ambassador Kamman wrote (see par. 96 above and Ex. V-8):

(A) "The [U.S.] Embassy had prior knowledge of the Colombian military's intent to interdict a small airplane believed to be involved in drug smuggling." It was that plane's landing on December 12, on a road just outside Santo Domingo, that triggered the ensuing combat between the Colombian military and FARC. (P. 2)

(B) All seven aircraft used by the Colombian Air Force in the December 12-13 operation were obtained from the U.S. Six came from the U.S. government under military assistance and sales programs, and one by commercial purchase from a private manufacturer. The UH-1H helicopter -- whose crew has been formally accused by Colombian civil authorities for the alleged bombing -- was provided to the Colombian Air Force in 1989 "as FMS assistance." (Pp. 3-4.)

(C) The U.S. has provided at least \$4.7 million in Foreign Assistance to Air Combat Command No. 2, one of the units involved in the December 12-13 air operation near Santo Domingo. (P. 3.)

118. On February 7, 1999, the Colombian Air Force Major who piloted one of the UH-60 Blackhawk helicopters used in the Santo Domingo operation on December 13, 1998, told an air force judge that "what we use is a sophisticated armament, made in a factory and bought from the United States and military industry."

119. The May 1, 2000 FBI report (par. 89 above) on the fragments sent from Santo Domingo found that they contained "exploded remains which are consistent with a twenty (20) pound United States designed AN-M41 fragmentation bomb and fuze."

XII. FINDINGS OF FACT

120. When the issue is one of State responsibility, the burden of proof is lower than the standard of proof beyond a reasonable doubt required in a criminal case.⁴⁴ Standards of proof in international proceedings are also "less formal" than in domestic courts.⁴⁵ International law permits courts to "weigh the evidence freely, although it has always avoided a rigid rule regarding the amount of proof necessary to support the judgment ..."⁴⁶

121. In cases involving State responsibility for gross violations of human rights, the Inter-American Court employs a "standard of proof which considers the seriousness of the charge and which, ... , is capable of establishing the truth of the allegations in a convincing manner."⁴⁷ The Tribunal understands this standard to be roughly equivalent, in terms used in the domestic legal system of the United States, to the "preponderance of evidence" standard of proof in civil cases, which in effect means that the evidence establishes that a particular conclusion is more probable than not. That is the standard which this Tribunal has endeavored to employ.

122. The Tribunal finds the following facts to be established by convincing evidence:

(A) Bombing: On the morning of Sunday, December 13, 1998, a Colombian Air Force helicopter dropped a cluster bomb on the hamlet of Santo Domingo.

Discussion: From the day of the explosion to the present, the survivors have been unanimous and consistent in their statements,⁴⁸ that the explosion was caused by one or more bombs or other objects released by Colombian Air Force helicopters flying overhead, immediately prior to the explosion. Although not all survivors actually saw the objects, and none were technically familiar with the nature of the weapons, all heard and felt the explosion.

Their testimony is corroborated by forensic evidence, including the April 28, 2000 CTI report, that shrapnel found in the bodies of the victims came from a cluster bomb. It is further corroborated by forensic evidence, including the CTI report and the May 1, 2000 FBI report, that fragments recovered at or near the scene of the explosion in Santo Domingo came from a cluster bomb.

⁴⁴See *Velasquez Rodriguez*, par. 134-35.

⁴⁵*Id.* par. 128.

⁴⁶*Id.* par. 127.

⁴⁷*Id.* par. 129.

⁴⁸The sole exception is a mysterious alleged military informant whose statement was vague and inconsistent with the statements not only of victims but also of the military witnesses. (See par. 95 and note 38 above.) The Tribunal accords no credibility to his contentions.

Their testimony is also partially corroborated in two respects by pilots of Air Force helicopters involved in the air operation, and by the report of the Air Force Liaison officer who directed it (even though the pilots deny dropping bombs on or knowing of any bombs dropped on Santo Domingo).

The first respect is timing. One pilot states he took off for the zone of the operation around Santo Domingo at about 9:00 a.m., another at 9:30 a.m. All place their arrival times in the zone between 9:30 and 10:30 a.m. The liaison officer's report to the Chief of Air Operations, dated four days after the event, states that the morning operation took place from 9:30 to 11:00 a.m. These time frames are consistent with, or close to, the consistent victim testimony that the bombing took place between 9:00 and 10:00 a.m., and more precisely, according to most victims, between 9:30 and 10:00 a.m.

Second, some air force officers admit that a cluster bomb was dropped near Santo Domingo, at about the time survivors say it hit the town. Two of the four pilots, as well as the liaison officer's report, state that at least one helicopter – the UH-1H formally accused of the bombing by civilian investigators – carried and dropped two cluster bombs on December 13. According to these pilots, the first bomb was dropped soon after they arrived in the zone that morning – as early as 9:30 or, according to the UH-1H pilot, at 10:30 or possibly as late as 11:00 a.m. They also acknowledge that this bomb was dropped near Santo Domingo – within 500 meters, according to one pilot and the liaison officer's report, or about 1000 meters, according to the UH-1H pilot.

Finally, the finding that an Air Force helicopter dropped a cluster bomb on Santo Domingo is reinforced by the unconvincing alternatives offered by the military to explain the explosion and deaths (findings G and H below), and by their efforts to cover up their knowledge that an Air Force helicopter carried and dropped cluster bombs in the operation. (Finding I below.)

The able defense counsel appointed to represent the interests of Colombia before this Tribunal challenge the conclusion that a bomb was dropped on Santo Domingo, on various grounds (defense brief, p. 9). None is persuasive. No evidence before the Tribunal supports the assertion of "serious chain-of-custody" problems with the FBI report.⁴⁹ Nor are statements by witnesses who saw one or more helicopters emit smoke, such as would result

⁴⁹The FBI cover note (p. 1) states, "The following specimens were recovered after an explosion in the vicinity of Santo Domingo in the municipality of Tame, Arauca, Columbia [sic], on 12/03/98 ..." It continues (p. 2), "On December 3, 1998, following combat between the Military Armed Forces of Columbia [sic] and Guerrilla groups, an explosion occurred within the center of a housing neighborhood. This explosion resulted in the deaths of sixteen (16) individuals. The National Human Rights Unit (NHRU), Prosecutor's Office lifted evidence from the bombing crime scene and provided a portion of the evidence to Legat Bogota. Through Legat Bogota, NHRU requested FBI Laboratory to assist in identifying the explosive device." (Ex. V-1.) Other than the obviously mistaken date (Dec. 3 rather than Dec. 13), the Tribunal has no basis to question the FBI's identification of the source of the fragments it analyzed.

from firing rockets, inconsistent with the dropping of a gravity bomb by one helicopter. The military testimony indicates that at least two helicopters in the Santo Domingo operation that morning carried rockets (par. 79 (b) above).

Defense counsel also argue, in the alternative, that if any Colombian Air Force helicopter dropped a bomb on Santo Domingo, it did so by "accident." So far as the Tribunal is aware, this claim has never been advanced by the Colombian military, which has consistently denied that it dropped a bomb on Santo Domingo on December 13, 1998. Nonetheless the Tribunal has considered this theory. The defense brief (p. 11) argues that

" ... The fighting was as close as 200 meters from the town; no helicopter ever stopped over the village; and only one bomb was dropped. Even more significant, though, is the *direction* the helicopter that allegedly dropped the bomb was moving. As is clear in the photograph taken by Mr. Romo of the explosion pattern, that pattern *fans out toward the direction of the fighting*. Fighting that was only 200 meters from the town. The helicopter was flying toward the fighting, the forward momentum of the dropped bomb continued in that direction, and the explosion pattern, as captured on film, reflects this forward momentum. This bomb was dropped too soon. It was not meant for the villagers of Santo Domingo; it was meant for the guerrillas only 200 meters away." (Italics in original.)

The Tribunal is not persuaded by this hypothesis, which is contrary to the weight of both direct and circumstantial evidence. First, all direct testimony – both civilian and military – places the fighting on the morning of December 13 considerably farther than 200 meters from the town. Most witnesses place the combat from 1000 to 2000 meters outside town; the closest estimate is 400 meters (and the time frame of that is not clear; it may have referred to later in the day). Moreover, in recounting what he was told by townspeople, Mr. Romo did not say that combat took place 200 meters from town, but rather that helicopters were firing at a tree line or jungle line about 200 meters from town.

Second, the most senior helicopter pilot in the operation (an Air Force Major) testified that given the location of the fighting well outside the town, it would be very difficult for an aircraft to have made a mistake over so long a distance as to drop a bomb on Santo Domingo (par. 80(J) above).

His judgment is supported by the facts that a cluster bomb is a gravity bomb, dropped rather than fired; that visibility was extremely clear that day (finding E below); and that the helicopters moved at a low velocity, all of which, he stated, kept aiming errors "minimal" (par. 80(E) above). The helicopter pilots also testified that they could see and distinguish persons on the ground dressed in civilian clothes; civilians, too, testified that the helicopters were close enough to see the civilians clearly.

Moreover, no witness testified, as the defense contends, that "no helicopter ever stopped over the village." The witnesses merely stated that the helicopters, including the one that dropped

the bomb, were moving. The question whether any of them ever stopped over the town was not asked. In any event, as noted by the Air Force Major, the helicopters were moving only at a low velocity.

The behavior of the helicopters immediately afterward is also inconsistent with the theory that the bomb was dropped by accident or by mistake. There is no evidence that they made any effort, whether by landing or by calling for medical assistance, to assist the civilians, if they had "accidentally" bombed them. On the contrary, they strafed the rescue vehicle attempting to carry the visibly wounded civilians to safety. That is not what one would expect from a helicopter which had dropped a bomb on them by accident. Nor is shooting at the rescue vehicle, immediately after the bomb was dropped, as it drove to Santo Domingo to assist the wounded, with a white shirt waving out the window.

The theory of an accident must also be viewed in light of the special and high level Air Force restrictions on bombing. According to the Inspector General of the Colombian Air Force, the use of bombs "requires special authorization from the Commandant of the Air Force" (par. 104 above). Although the Inspector General claims no authorization was given (*id.*), the Air Force Liaison officer who directed the air operation at Santo Domingo reports that he requested "general command authorization for a Beta support" (par. 104, note 39 above). He further reports that two cluster bombs were in fact dropped (par. 83 above) – with no suggestion that the bombing lacked authorization. In view of these high level restrictions on dropping bombs, the crew of the Air Force helicopter dropping a bomb could be expected to act with more than usual care, making an accidental drop even less likely.

But if the dropping of a bomb on Santo Domingo was not done by mistake or accident, what was the motive? While dropping a bomb on a civilian town is unlawful regardless of motive, and the Tribunal need not specify a motive, there is no lack of possible motive. The Air Force may have viewed the townspeople as allied with the guerrillas; indeed, the same pilot who discounted the likelihood of an accidental bombing, suggested that the guerrillas thought of the townspeople as "their own friends" (par. 80 (M) above). Another pilot stated that immediately prior to the morning air operation in which the first cluster bomb was dropped, "[W]e heard that there were four casualties in the troops and one minor officer had been killed" (par. 79 (a) above). The Air Force Major further claimed that guerrillas fired at the helicopters from the town (par. 80(L) above). In the highly polarized atmosphere of ongoing combat, any or all of these factors might have provided a motive to drop a bomb on a town perceived as allied with the enemy.

Considering all presently available evidence, the Tribunal is not persuaded by the theory that the bomb was dropped by accident or mistake.

(B) Cluster Bombs: The type of cluster bomb used at Santo Domingo is a lightweight, anti-personnel device, which is not fired, but dropped.

Discussion: The testimony and forensic reports are consistent that the type of cluster bomb carried by the UH-1H helicopter at Santo Domingo is a lightweight (twenty pound) anti-personnel bomb, which consists of a cluster of six smaller units, which may leave six points of impact upon falling. It is not fired, but dropped, relying on gravity, not propulsion, to reach its target. It is designed to activate on impact, that is, when it hits the ground or some other object.

(C) Deaths and Injuries: Seventeen persons were killed, and approximately 25 wounded, as a result of the cluster bomb dropped by the Colombian Air Force on Santo Domingo on the morning of December 13.

Discussion: All available medical and official death reports listed explosion or shrapnel as the cause of death or injury. None listed bullets or gunfire. No bullets -- only shrapnel -- were recovered from the bodies of the dead and wounded. The April 28, 2000 CTI report confirms that shrapnel recovered from some bodies came from a cluster bomb. The survivors all state that they were injured immediately after the explosion; none stated that he or she had been shot. Moreover, at the time of the explosion and the deaths and injuries, the combat and the Colombian army -- and the gunfire -- were at a distance considerably removed from the town.

(D) The Victims: Those killed and injured by the explosion were unarmed, non-combatant civilians. Six of those killed and at least nine of the wounded were children, some as young as four years old.

Discussion: The survivors state that those killed and injured by the explosion were unarmed, non-combatant civilians. There is no credible evidence to the contrary.

(E) Combat: At the time of the bombing and beforehand, combat was taking place outside, not inside Santo Domingo.

Discussion: The survivor testimony was consistent that prior to the bombing, there was no combat or combatants, whether military, guerrilla, police or other uniformed personnel, in Santo Domingo. The army testimony is also consistent that at the time of the alleged bombing, combat was well removed from the town (at a distance of two kilometers, according to the army judge, summarizing the army testimony). The weight of the army and air force testimony is also that on the morning of December 13, the guerrillas were in the brush, well removed from the town.

Military testimony does place guerrillas in the town at various times *after* the bombing -- as early as the afternoon of December 13, and at least as late as December 16. But few claim to have seen guerrillas in the town on the morning of December 13. One Air Force

helicopter pilot claims to have seen five or six guerrillas at the extremes of the town, but this same pilot implausibly denies even knowing that another helicopter carried cluster bombs. The survivors emphatically deny that there were guerrillas in the town, denouncing it as a lie. (In any event, as noted below, a small guerrilla presence would not convert a civilian town into a military target.)

(E) Visibility: The bombing occurred in daylight hours with clear visibility.

Discussion: One Air Force pilot testified that visibility was not only clear but at its maximum, up to ten kilometers. No one disputed this. Several pilots testified that they could see persons on the ground clearly and could even distinguish civilian clothes from uniforms.

(F) Knowledge: It is probable that at the time the bomb was dropped, other Air Force personnel knew that it had been dropped.

Discussion: There are several reasons to conclude that other Air Force personnel, in addition to the crew of the helicopter that dropped the bomb, must have known at the time that the bomb had been dropped. At least four Air Force helicopters were on mission in the zone of operations at the time, with drop points 3 kilometers north and 6 kilometers west of Santo Domingo, on a day when visibility was clear and up to ten kilometers. The pilots met together immediately beforehand to plan the mission. The UH-1H helicopter pilot testified that he received the "instruction" to drop the first cluster bomb (the one he claims fell 1000 meters from the town) from the H-500 helicopter (based at the same air base as the UH-1H), and that he received "indications" to drop the second cluster bomb (six kilometers from town), from a UH-60 helicopter. A crew member of one UH-60 helicopter explained that targeting decisions were made by electronic communications between ground troops and helicopter crews in communication with the other helicopters and with surveillance aircraft. At least one Air Force surveillance plane allegedly conducted video surveillance of the zone at the time; the Commander of the army Battalion involved in the combat states that "you could hear the detonation" (which he says was "presumably" the truck bomb) on the tape. Finally, several survivors say that two helicopters pursued the truck carrying the wounded out of Santo Domingo shortly after the bombing.

(G) The Alleged Truck Bomb: No car bomb exploded inside the truck parked in Santo Domingo.

Discussion: The "truck bomb" theory – that the explosion in Santo Domingo was caused by a homemade car bomb placed inside a truck by the guerrillas in anticipation of the army's arrival, but which went off prematurely – has been rejected by survivors since the beginning, and is now convincingly refuted by forensic evidence. The December 10, 1999 report from the Forensic Ballistic Laboratory of Colombia's National Institute of Legal Medicine and Forensic Sciences concludes that the truck was hit from above, rather than exploding from within. This finding was confirmed by the April 28, 2000 CTI report, which found that the truck had been hit from above, with entry holes rather than exit holes, and fragments of a

cluster bomb inside the truck. Witness Romo likewise found several signs that the truck had not exploded from within, and no signs of a homemade bomb. The embedded shrapnel he found came from a manufactured, not a homemade bomb.

The truck bomb theory is also inconsistent with the survivor testimony that the explosion occurred immediately after objects were dropped on Santo Domingo by an Air Force helicopters overhead. It is further refuted by evidence that shrapnel recovered from the bodies of the dead and wounded, according to the CTI report, came from a cluster bomb, not a homemade bomb.

The theory never had much evidentiary support. Initially proposed by military personnel based on visual observation or even speculation, it was only partly supported by military technicians, whose inspections were supervised on-site by senior military officers who knew or should have known, but did not disclose, that an Air Force helicopter had dropped a cluster bomb in the vicinity. The military technicians lacked independence, and their findings were later rejected by civilian technicians.

The truck bomb theory is not made more credible by its portrayal in the video, "The Great Truth About Santo Domingo." The video is a montage of film footage taken on different dates, times and places, not always identified and all lacking verification, evidently prepared for propaganda purposes. The result is unconvincing and lacking in probative value.

(H) Other Military Claims: Other explanations given by the military to explain the deaths at Santo Domingo are not credible.

Discussion: In addition to the truck bomb theory, military witnesses and senior military officials have variously claimed that (1) the guerrillas used the victims at Santo Domingo as human shields, placing them in the crossfire; (2) the victims were killed elsewhere and their bodies brought to Santo Domingo; and (3) a cluster bomb tail found near the truck in Santo Domingo must have been brought in from elsewhere, because the Colombian Air Force no longer used such bombs. None of these explanations is credible.

The human shield theory fails because there is no evidence that any victims were killed by bullets, as they would have been, had they been placed in crossfire. Moreover, on the morning of December 13, the ground combat was well removed from Santo Domingo. The survivors also uniformly deny that guerrillas forced them from their homes, or that guerrillas were in Santo Domingo before the townspeople fled.

The theory that victims were killed elsewhere, and their corpses then brought to Santo Domingo, is inconsistent with the April 28, 2000 CTI report, which found that the shrapnel in the victims' bodies was the same as the shrapnel recovered at the scene. This theory is also uniformly denied by survivors.

Finally, the hypothesis that the cluster bomb tail was brought in from elsewhere similarly conflicts with the CTI finding that the shrapnel in the bodies was the same as that at the scene, and that both came from a cluster bomb. For the hypothesis to work, the guerrillas would have had to bring in bodies of victims killed by cluster bombs somewhere else, together with fragments of those bombs, and plant both in Santo Domingo. But if so, where else were the victims bombed that weekend? And if the Colombian Air Force no longer used twenty pound cluster bombs, why was the UH-1H helicopter carrying them that day? This theory, again, is uniformly denied by survivors.

(I) Cover-up: Colombian Air Force officers have engaged in a continuing cover-up of the bombing and obstructed justice.

Discussion: The crew of the helicopter which dropped the bomb, and probably the crews of other helicopters in the operation, must have known on December 13, 1998, that a cluster bomb had hit Santo Domingo. The fact that a helicopter carried and dropped cluster bombs during the operation was internally reported by the Air Force liaison officer to the Chief of Air Operations on December 17, 1998. (Par. 83 above.) It was also disclosed by the pilot of a UH-60 helicopter in the operation, in his testimony to the army judge on December 24, 1998. (Par. 79(c) above.)

Yet this knowledge was not made public. On the contrary, the Commandant of the Air Force, in public statements reported in leading Colombian newspapers during December 15-23, 1998, denied that helicopters in the operation even had the capability to carry bombs, let alone that they carried cluster bombs, and still less that they dropped two of them on December 13. (Pars. 107-09 above.)

When the army judge on December 24, 1998, asked the Air Force Inspector General's office for detailed information on "war material" and "explosives" used by aircraft in the operation, the December 29 reply mentioned only rockets and munitions, not cluster bombs. (Par. 103 above.) On January 12, 1999 -- well after the use of cluster bombs in the operation had been reported up the chain of command -- the Air Force Inspector General sent the air force judge a preliminary report on the Santo Domingo operation. The report failed to mention even the participation of the UH-1H helicopter, much less that it had carried and dropped cluster bombs. (Par. 104 above.)

Nor were the facts that cluster bombs were carried and dropped by an Air Force helicopter during the operation disclosed in the military's subsequent, publicly distributed video, "The Great Truth About Santo Domingo" (see subpart G above).

(J) Justice: Colombian authorities have not carried out adequate, effective, independent or timely investigations or prosecutions of military suspects in regard to the Santo Domingo bombing or the cover-up.

Discussion: See analysis in Parts V and VIII above on exhaustion of domestic remedies.

(K) Harassing Survivors: Colombian Air Force aircraft fired alongside civilian vehicles attempting to evacuate civilian dead and to transport civilian wounded to medical attention.

Discussion: The Tribunal heard testimony from the driver of an open bed, civilian pick-up truck that carried dead and wounded civilians out of Santo Domingo, as well as from a wounded passenger, that a helicopter flying low enough to see the wounded civilians pursued the truck for some distance, firing alongside it. The Tribunal finds this testimony, which is corroborated by other survivors, to be credible.

(L) Sacking: There is sufficient evidence of the alleged sacking of Santo Domingo to warrant further investigation.

Discussion: By the afternoon of December 13, 1998, most or all civilians fled Santo Domingo. Guerrillas were reportedly seen in the town at various times from the afternoon of December 13 until at least December 16. The army then occupied the town from December 16-22.

The Tribunal heard testimony from a witness who stated that he returned briefly to his home in Santo Domingo on December 16 to recover belongings, when the army was already in the town. At that time his home was in order, but when he returned a few days after the end of the army occupation, it had been sacked. The Tribunal finds that witness to be credible. Other witnesses before the Tribunal, who last saw their homes on December 13 or 14, also returned after the army occupation, to find them sacked.

Although the Tribunal refrains from making any finding with respect to who was responsible for the alleged sacking, the evidence before the Tribunal is sufficient to warrant a full investigation of the sacking. In June 2000, the Attorney General of Colombia opened a formal disciplinary investigation of the commander of the army battalion involved in the occupation, for the alleged sacking.

(M) Pattern: The bombing of Santo Domingo and the ensuing impunity is part of a broader pattern of human rights violations committed by military forces and subsequent impunity.

Discussion: See Part V, paragraphs 58-60 and 67-68, and Part X above.

XIII. CONCLUSIONS OF LAW

123. The Tribunal has found that at least one helicopter of the Colombian Air Force dropped a bomb on the civilian town of Santo Domingo, killing and wounding civilians, and that Colombian authorities thereafter failed adequately to investigate the incident and the military responsibility for it. Applying international law on State responsibility (par. 5 above) as well as the substantive law applicable to this proceeding (Part IV above) to its findings of fact (part XII above), the Tribunal concludes that the Republic of Colombia is responsible for the following violations of international human rights and humanitarian law:

(A) Right to Life.

Discussion: International law prohibits arbitrary deprivations of life,⁵⁰ and requires States to act to "ensure" the right to life of their citizens.⁵¹ By the dropping of a bomb on Santo Domingo by the Colombian Air Force, the State of Colombia is responsible for arbitrarily taking the lives of seventeen unarmed civilians. It has thereby violated their right to life and failed in its duty to ensure that right.

Even if the State of Colombia had not initially been responsible for the bombing, it would now be responsible, because of the subsequent failure of State authorities to conduct a thorough and independent investigation and prosecution, and to pay adequate reparations to the victims. (See parts (G) and (H) below.) As the Inter-American Court has ruled, "An illegal act which violates human rights and which is initially not directly imputable to a State ... can lead to international responsibility of the State, ... because of the lack of due diligence ... to respond to it as required by the Convention."⁵² Far from meeting its obligation to conduct an adequate and effective investigation, the State of Colombia, through its Air Force, has on the contrary attempted to cover up its own responsibility for the bombing and falsely to shift direct responsibility to the guerrillas.

⁵⁰American Convention on Human Rights ("ACHR") art. 4.1. See also International Covenant on Civil and Political Rights ("ICCPR") art. 6; Convention on the Rights of the Child ("CRC") arts. 6.1 and 6.2; Geneva Convention Relative to the Protection of Civilian Persons in Time of War ("GC") art. 3.1(a); and Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II) ("P.II"), art. 4.2(a).

⁵¹ACHR art. 1.1.

⁵²*Velásquez Rodríguez*, par. 172, quoted in par. 5(D) above.

(B) Right to Personal Integrity.

Discussion: International human rights law guarantees the right to physical, mental and moral integrity,⁵³ and likewise requires States to act to "ensure" this right. By the dropping of a bomb on Santo Domingo by the Colombian Air Force, the State of Colombia is responsible for injuring approximately 25 unarmed civilians. It has thereby violated their right to physical, mental and moral integrity, and failed in its duty to ensure that right.

(C) Rights of Civilians.

Discussion: Military forces may not bomb defenseless, unarmed, non-combatant civilians, in a civilian town.⁵⁴ International humanitarian law provides, "The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations."⁵⁵ Further, "The civilian population as such, as well as individual citizens, shall not be the object of attack."⁵⁶

By the dropping of a bomb on Santo Domingo, the State of Colombia is responsible for violations of these fundamental norms of international humanitarian law.

There was military testimony claiming that some guerrillas were in the town and firing at Air Force aircraft -- an allegation denied by the townspeople. Even if the military claim were true, however, a small guerrilla presence would not convert a civilian town into a military target. Customary international law prohibits military attacks which foreseeably will cause disproportionate civilian casualties.⁵⁷

⁵³ACHR art. 5. See also ICPR art. 7, GC art. 3.1(a), P.II art. 4.2.a.

⁵⁴P.II arts. 13.1 and 13.2, CRC arts. 38.1 and 38.4.

⁵⁵P.II art. 13.1.

⁵⁶P.II art. 7.2.

⁵⁷The customary international law principle of proportionality is reflected, for example, in the Rome Statute for an International Criminal Court ("ICC Statute"), article 8.2(b)(iv) of which defines the following as a war crime: "Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians ... which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated; ..." (Accessible at <http://www.un.org/law/icc/statute/romefra.htm>) Colombia signed the treaty embodying this Statute on December 10, 1998. However, the treaty is not yet in force, and is cited here merely as a specific articulation of the longstanding principle of proportionality in customary international law.

(D) Rights of Children.

Discussion: States undertake to ensure to children such protection and care as is necessary for their well-being and, to that end, must take all appropriate legislative and administrative measures.⁵⁸ States must also "take all feasible measures to ensure protection and care of children who are affected by armed conflict,"⁵⁹ and must take "all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of ... armed conflicts."⁶⁰

By dropping a bomb on the civilian town of Santo Domingo, killing at least six children and wounding at least nine, the State of Colombia has failed in its duty to protect these children and to take adequate measures to protect them, or to provide for their recovery and reintegration.

(E) Right of Wounded to Humane Treatment.

Discussion: International humanitarian law provides, "All the wounded, ... , whether or not they have taken part in the armed conflict, shall be respected and protected."⁶¹ And, "In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition."⁶²

Noting that the helicopters that allegedly fired at the truck evacuating the wounded did not actually hit the truck or its occupants, defense counsel argue that there must not have been an attempt to prevent the wounded from reaching medical care. But the standard of care owed to the wounded is higher than merely not shooting them or their rescue vehicle. Firing alongside their rescue vehicle fails to accord the wounded the respect, protection and humane treatment to which they are entitled. The State of Colombia is responsible for violating its duties toward the wounded.

⁵⁸CRC art. 3.2. See also ICPR art. 24.1, CRC arts. 2.1, 4, 19.1, 24.1, 24.2.b, and 37.c, and P.II art. 4.3.

⁵⁹CRC art. 38.4. Although this violation and that of art. 39 (see note 60 below) were not alleged in the Complaint, the Tribunal follows the well-established practice of international courts in conforming its findings to the proof, under the general principle of law of *iura novit curia*. *Velásquez Rodríguez*, par. 163.

⁶⁰CRC art. 39.

⁶¹P.II 7.1. See also ACHR arts. 1.1 and 5, ICPR arts. 2.1 and 7, CRC arts. 24.1 and 24.2.b, GC art. 3.2, P.II arts. 4.2 and 7.2.

⁶²P.II 7.2.

(F) Sacking:

Discussion: Applicable international human rights law protects the right to property, and prohibits takings, except upon just compensation according to law.⁶³ International humanitarian law specifically prohibits pillage.⁶⁴ The Tribunal has found evidence of sacking sufficient to warrant a full investigation as to who was responsible for the sacking. The Tribunal commends the Attorney General of Colombia for initiating a disciplinary investigation of sacking.

(G) Duty to Investigate and Prosecute.

Discussion: States have duties to undertake reasonable, good faith investigations and prosecutions of those responsible for human rights violations, including military commanders who may have command responsibility for violations committed by their subordinates, which they failed to investigate or prosecute. These duties are violated by cover-ups and by obstruction of justice.⁶⁵

As the Inter-American Court has explained:

"The State has a legal duty ... to use the means at its disposal to carry out a serious investigation of violations ..., to identify those responsible, [and] to impose the appropriate punishment ..."⁶⁶

Moreover, the "investigation must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for truth by the government."⁶⁷

The Tribunal has found that the criminal investigations by Colombian authorities have not been effective, and that the investigations by military courts have also not been independent or impartial. The Tribunal has further found that Air Force officers, including senior officers, have engaged in a cover-up and have obstructed justice.

⁶³ACHR art. 21.1 and 21.2.

⁶⁴P.II. Art. 4.2(g). Pillage refers to plunder of property.

⁶⁵ACHR arts. 1.1, 8.1 and 25, ICPR arts. 2.1, 2.3 and 14.1, and CRC arts. 2.1, 3.2 and 19.1, customary international humanitarian law.

⁶⁶*Velasquez Rodriguez*, par. 174.

⁶⁷*Id.* par. 177.

The Tribunal commends the Attorney General of Colombia for opening a full disciplinary investigation, in June of 2000, of the helicopter crew alleged to have dropped the bomb on Santo Domingo. However, because of the Attorney General's limited jurisdiction, this investigation is incapable of meeting the State's duty to conduct an investigation for purposes of criminal prosecution. In addition, the Attorney General's Order opening the full investigation does not embrace senior officers and other air force personnel, for their possible involvement in the cover-up.

Because of the serious violations of the human rights of civilians in this case, the duty to conduct appropriate criminal investigations and prosecutions rests with civilian authorities.⁶⁸ The Tribunal commends the civilian investigators of the NHRU, CTI and the Forensic Ballistic Laboratory of the National Institute of Legal Medicine and Forensic Sciences, for taking significant investigative steps during late 1999 through April 2000. However, the potential for those steps to lead to justice was nullified -- to date -- by the NHRU Order of May 30, 2000, which remanded the case to the air force court with instructions to open a full investigation. The air force court, which had previously closed the case and which lacks independence and impartiality, has since declared the NHRU remand to be a legal nullity. As a result, by the date of the hearings before this Tribunal in September 2000, no military personnel were even the subject of a full criminal investigation, let alone prosecution. So far as the Tribunal can determine, this state of affairs has not changed since September 2000.

Accordingly, the Tribunal concludes that the State of Colombia has failed in its duty to undertake reasonable, timely, good faith investigations and prosecutions of military suspects in the Santo Domingo case.

(H) Duty to Provide Reparations.

Discussion: States have a duty to provide adequate reparations to the victims of serious violations of human rights, and to their survivors and family members.⁶⁹

There is no evidence that Colombian authorities have provided adequate reparation to the families of those killed and to those wounded in Santo Domingo. The State of Colombia has failed in its duty to provide adequate reparations.

(I) Duty to Adopt Measures to Protect Human Rights.

Discussion: States have a duty to adopt legislation and other governmental measures reasonably designed to ensure the enjoyment of human rights.⁷⁰ For example, states

⁶⁸Sentence No. C-358/97 of the Constitutional Court of Colombia, par. 63 above.

⁶⁹ACHR arts. 1.1, 8 and 25, ICPR arts. 2.1, 2.3 and 14.1, CRC art. 39.

⁷⁰ACHR arts. 1.1 and 2, ICPR arts. 2.1 and 2.2, CRC arts. 2.1 and 4.

"undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, ..."71

As the Inter-American Court has explained, this duty to "ensure" the free and full exercise of rights:

"implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, States must prevent, investigate and punish any violation of the rights provided by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation."72

The State's "duty to prevent [human rights violations] includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages."73

The American Convention further provides, "Where the exercise of any of the rights or freedoms ... is not already ensured by legislative or other provisions, the States Parties undertake to adopt, ... , such legislative or other measures as may be necessary to give effect to those rights or freedoms."74

In this case the clearest way in which the State has failed to adopt means to protect human rights is by leaving the investigations of alleged violations of human rights by military suspects within the jurisdiction of military rather than civilian prosecutors and courts.⁷⁵ The State of Colombia has failed in its duty to adopt appropriate measures to ensure human rights.

⁷¹ACHR 1.1.

⁷²*Velasquez Rodriguez*, par. 166.

⁷³*Id.* para. 175.

⁷⁴ACHR art. 2.

⁷⁵The new Military Penal Code, effective in 2000, requires that cases of genocide, torture and forced disappearance by military personnel be tried in civilian courts. (See par. 101 above.) The Santo Domingo case, however, does not involve these particular crimes. The State has thus failed to adopt legislation providing for civilian jurisdiction over the kinds of human rights violations committed in this case.

XIV. RECOMMENDATIONS

124. The Tribunal has found that at least one helicopter of the Colombian Air Force dropped a bomb on the civilian town of Santo Domingo, killing and wounding civilians, and that Colombian authorities thereafter failed adequately to investigate both the incident and the military responsibility for it. (Par. 122 above.) The Tribunal has concluded that by these actions and omissions, the State of Colombia is responsible for violations of the human rights to life, personal integrity, protection of civilians, protection of children, and to humane treatment of the wounded, and has failed in its duties under international human rights and humanitarian law to conduct adequate investigations and prosecutions, to provide adequate reparations to victims and survivors, and to adopt measures to protect human rights.

In view of these findings and conclusions, the Tribunal of Opinion recommends the following:

- (A) The Tribunal recommends that the Government of the Republic of Colombia, and all authorities of the State, acting within their respective spheres of competence:
 - (1) Ensure that a full criminal investigation, by competent civilian authorities, is conducted of the responsibility of the following persons, and if warranted by the investigations, prosecution and, if found guilty, their appropriate punishment:
 - (A) Of the crew of Colombian Air Force helicopter UH-1H FAC 4407, for dropping a cluster bomb on the hamlet of Santo Domingo, Department of Arauca, on the morning of December 13, 1998;
 - (B) Of the crews of all other Air Force aircraft involved in the air operation near Santo Domingo on the morning of December 13, 1998, and of the Air Force Liaison officer who directed the operation, as possible accomplices to the dropping of a bomb on civilians and on a civilian town;
 - (C) Of all persons in the chain of command who received or knew contemporaneously of any request from the Air Force Liaison officer for permission to drop a bomb, and of any actions they took in response, as possible accomplices to the dropping of a bomb on civilians or on a civilian town; and
 - (D) Of the foregoing officers and crews, and of the Commandant of the Air Force, Inspector General of the Air Force, Chief of Air Operations, and Commandant and senior staff officers of the 18th Brigade of the Army, for possible involvement in covering up material facts relating to the dropping of a bomb and for obstruction of justice.

- (2) Ensure that the disciplinary investigations presently being conducted by the Attorney General of Colombia be expanded to include all those persons and offenses cited in the preceding subparagraph.
- (3) Ensure that adequate reparations are paid to the survivors and to the families of those killed in Santo Domingo on the morning of December 13, 1998.
- (4) Ensure that appropriate measures are taken to promote physical and psychological recovery and social reintegration of the child victims of the bomb dropped on Santo Domingo.
- (5) Adopt all necessary legislative and administrative measures to ensure that all criminal investigations and prosecutions of military personnel accused of violations of human rights are conducted by civilian rather than military authorities.

The 1997 ruling of the Constitutional Court (par. 63 above) already appears to require civilian court jurisdiction over the dropping of a bomb on Santo Domingo, since it expressly requires civilian jurisdiction over extremely grave offenses, such as crimes against humanity. In view of the widespread pattern of violations of human rights of the civilian population by the Colombian military, the dropping of a bomb on Santo Domingo qualifies as a "crime against humanity."⁷⁶ In any case, civilian jurisdiction over an offense as grave as the bombing of a civilian town should not depend on the existence of a broader pattern of offenses.⁷⁷ Whenever military suspects are credibly accused of violations of human rights against civilians, Colombian military courts cannot conduct investigations or trials that meet minimum international standards of independence and impartiality.

- (B) The evidence before the Tribunal suggests that the helicopter which dropped the bomb was given to Colombia as part of U.S. military aid; that other aircraft in the operation were also obtained from the U.S.; and that the bomb dropped in Santo Domingo was made in the U.S..⁷⁸

⁷⁶For purposes of the International Criminal Court, crimes against humanity are defined to include certain violent and illegal acts "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack ..." ICC Statute, note 57 above, art. 7.1.

⁷⁷Nothing in the Constitutional Court decision requires proof of such a pattern.

⁷⁸Because the U.S. Government was not invited to appear before the Tribunal, however, the Tribunal refrains from making findings on these points.

The Tribunal accordingly recommends that the Government and Congress of the United States of America, acting within their respective fields of competence, take the following actions:⁷⁹

(1) The Leahy Law⁸⁰ requires suspension of U.S. aid to units of the Colombian military "credibly alleged to have committed gross violations of human rights" until the Secretary of State reports that effective measures are taken to bring those responsible to justice. The Tribunal therefore recommends that the Secretary of State give due consideration to whether military aid must be suspended to the responsible units of the Colombian Air Force and Army, pending full and independent investigations by civilian authorities and, if warranted by the investigations, prosecutions by civilian courts of those responsible for the dropping of a bomb at Santo Domingo, whether as direct participants, accomplices or participants in the ensuing cover-up.

(2) Insofar as relevant here, the legislative human rights conditions on U.S. aid to Plan Colombia,⁸¹ require that the Secretary of State must certify: (1) "that the Commander General of the Colombian Armed Forces is promptly suspending from duty any Colombian Armed Forces personnel who are credibly alleged to have committed gross violations of human rights ...";⁸² (2) that "the Colombian Armed Forces and its Commander General are fully complying with" the foregoing condition;⁸³ and (3) that "the Colombian Armed Forces are cooperating fully with civilian authorities in investigating, prosecuting, and punishing in the civilian courts Colombian Armed Forces personnel who are credibly alleged to have committed gross violations of human rights. ..."⁸⁴

The Tribunal therefore recommends that the Secretary of State give due consideration to refraining from certifying that these conditions are met until such time as all Colombian military personnel who are credibly alleged to have participated in the

⁷⁹In view of these recommendations, the objection of defense counsel to any evidence relating to U.S. military aid to Colombia is overruled.

⁸⁰Section 564 of the Fiscal Year 2000 Foreign Operations Appropriations Act. The Leahy Amendment was first enacted in 1996.

⁸¹See White House Press Release, August 23, 2000, Memorandum of Justification in Connection with the Waiver Under Section 3201(a)(4) of the Emergency Supplemental Act, As Enacted in the Military Construction Appropriations Act, 2001. Ex. V-16.

⁸²Section 3201(a)(1)(A)(ii).

⁸³Section 3201 (a)(1)(A)(iii).

⁸⁴Section 3201(a)(1)(B).

dropping of a bomb on Santo Domingo are suspended from duty and the Colombian military fully cooperates with civilian authorities in investigating, prosecuting and punishing them in civilian courts.

(3) One or more appropriate committees of Congress should conduct an investigation and public hearing into the Santo Domingo case, and the use of U.S. military assistance in dropping a bomb on a civilian town; and

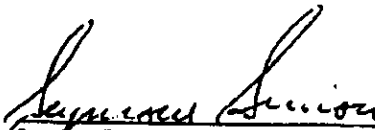
(4) Legislative or administrative measures should be considered so that, in future, U.S. investigations of credibly alleged violations of human rights by the Colombian armed forces are conducted by an independent investigating team. Such a team should make use of the resources and expertise of relevant Government agencies, including but not limited to those of the Assistant Secretary of State for Democracy, Human Rights and Labor.

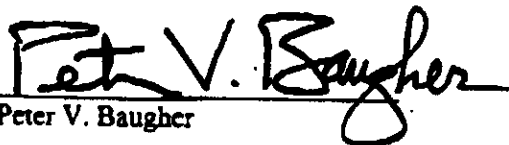
(C) With respect to international human rights bodies, the Tribunal recommends:

- (1) That an appropriate complaint, reflecting the Judgment of this Tribunal, be filed with the Inter-American Commission on Human Rights;
- (2) That the Human Rights Committee of the United Nations take this Judgment into account in its next periodic review of compliance by the Republic of Colombia with the International Covenant on Civil and Political Rights; and
- (3) That the Bogota office of the United Nations High Commissioner for Human Rights review this Judgment, conduct such investigation into the Santo Domingo case as it may deem appropriate, and monitor and publicly report on the steps taken by the Republic of Colombia to carry out full and independent criminal investigations and prosecutions in the case as well as disciplinary investigations, to provide adequate reparations to the victims and their families, and to ensure that cases in which members of the military are alleged to have committed violations of human rights are investigated and, if warranted, prosecuted, by civilian rather than military authorities.

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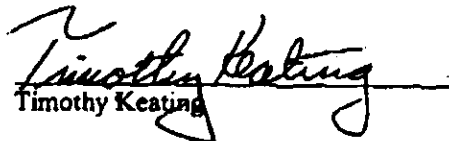
Done in English, the English text being authentic, with a Spanish Translation to follow, in Chicago, Illinois, United States of America, on this eighth day of December, 2000.


Justice Seymour Simon
Tribunal President


Peter V. Baugher



Thomas Gumbleton


Bernardine Dohrn


Timothy Keating

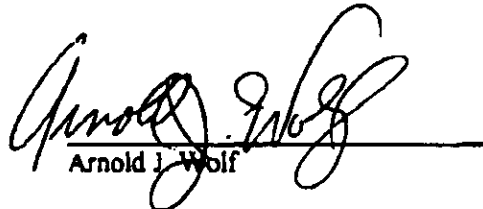

Rita Aliese Fry


Dawn Clark Netsch


Jesus G. Garcia


Dom J. Rizzi


Maricela Garcia


Arnold J. Wolf

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**CONCURRING OPINION
OF TRIBUNAL MEMBER BERNARDINE DOHRN
ON THE RIGHTS OF CHILDREN**

Introduction

While concurring in the Judgment of the Tribunal, I write separately to emphasize the violations of the internationally guaranteed rights of children in this case.

On December 13th, 1998, a Colombian Air Force helicopter dropped a cluster bomb on the hamlet of Santa Domingo, resulting in the deaths of six children between the ages of four and sixteen, and eleven adults. In addition, at least nine other children were injured, and numerous left without surviving family members. The following is a list of the names and ages of the children killed during this incident:

Jaime Castro Bello, 4
Luis Carlos Neite Mendez, 5
Edna Maragarita Abello Tilano, 5
Deysi Catherine Cardenas Tilano, 7
Oscar (Jorge) Esneider Vanegas, 13
Yohanny Hernandez Becerra, 16

All the victims were residents of Santo Domingo, in the Department of Arauca, Republic of Colombia, a small village with no prior documented armed conflict, or contact with guerrilla forces. Festivities were anticipated for the children of Santo Domingo during the weekend of December 12th and 13th, 1998. Citizens of the small hamlet planned a two-day bazaar to raise money for their local school. On a clear Sunday morning, as the children and adults of Santo Domingo made preparations, the outdoor festival was cut short by the explosion of a cluster bomb.

On September 22nd and 23rd, 2000, evidence concerning the bombing of Santo Domingo was presented before a Tribunal of Opinion, convened by the Center for International Human Rights of Northwestern University School of Law in Chicago, Illinois, United States of America, in response to a request from a human rights organization in Colombia. A total of fourteen witnesses, eight of whom traveled from Colombia to testify on behalf of the victims, presented live testimony directly to the Tribunal. In addition, the Tribunal was presented with multiple documents, including survivor statements and statements excerpted from Colombian military court files, helicopter pilot testimony before Colombian military courts, other Air Force and Army testimony, forensic evidence from the U. S. Federal Bureau of Investigation ("FBI") crime laboratory and the Technical Investigation Corps ("CTI") of the Colombian Prosecutor General's office, the U.S. Embassy letter, and public statements by military officials.

The Tribunal findings -- that the Republic of Colombia violated international and humanitarian law -- include additional evidence relevant to the rights of children.

Because the Republic of Colombia ratified international treaties and laws, it assumed special duties to its children and to the child survivors and victims of this tragedy under international human rights and humanitarian law. First, the Colombian government has the responsibility to protect its children from armed conflict. Second, the government of Colombia is obligated to promote the physical and emotional recovery and social reintegration of children wounded in armed conflict or who survived civil strife. Third, the State is required to ensure the protection and care of the child, the survival and development of the child, the right of the child to have access to health care services, and to take all measures to protect the child from injury.

The government of Colombia adopted specific legal responsibility for its children by ratifying the following treaties: The Convention on the Rights of the Child, the American Convention on Human Rights, the International Covenant on Civil and Political Rights, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, and the Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts.

The Convention on the Rights of the Child

The Republic of Colombia signed the Convention on the Rights of the Child ("CRC") on January 26, 1990, and ratified it on January 28, 1991.

Article 38: Care and Protection of Children Affected by Armed Conflict

Article 38 of the CRC states, in relevant part:

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by armed conflict.

The conditions surrounding Santo Domingo on December 12th and 13th of 1998 can properly be described as armed conflict. On December 12th, 1998, villagers of Santo Domingo witnessed several Colombian Air Force helicopters circling the area and observed airfire at a distance of approximately 300 feet from their homes. While there was no credible evidence of guerrilla presence in Santa Domingo, there was armed conflict, apparently between guerilla forces and the Colombian military, in neighboring hamlets in the region. On Sunday morning, December 13th, 1998, at least four helicopters continued to circle the village of Santo Domingo; one helicopter dropped a bomb on the hamlet, killing and wounding children and adult civilians; and two helicopters fired, from close range, upon survivors of the attack who were attempting to transport wounded and dying children, friends and family to the closest accessible medical facilities.

Witness #1 testified that early on the morning of December 13, 1998, another resident of Santo Domingo begged him to assist children wounded in the attack, stating "They killed my family and they killed the people of Santo Domingo." This witness drove to Santo Domingo waving a white T-shirt out of the window of his truck, "as a peace sign." After loading multiple victims, including two dead children, onto the bed of his truck, he drove towards the town of Tame to procure medical assistance for the wounded. He testified that as he was driving away from Santo Domingo, two helicopters descended and shot near his truck from close range. He stated that it was difficult to drive because he "could see pieces of earth come up" from the ground. Witness #1 also testified that there is only one road in the village.

Witness #2, a sixteen year old child when the incident in Santo Domingo occurred, had volunteered to help with the bazaar during that weekend. Unlike Witness #1, this witness remained in Santo Domingo during the night of December 12th, and observed helicopters flying over the town and firing on a neighboring area with machine guns. She and about twenty friends initially attempted to leave the area, but later returned out of fear of "what was happening around us." She further testified that she and her friends lay in the streets of Santo Domingo early Sunday morning to demonstrate to the helicopters their civilian status. As she was lying in the road, she saw one helicopter drop "things that looked like paper", heard an explosion, and then observed complete darkness. She awoke to complete chaos, with "everyone screaming" and discovered a piece of shrapnel embedded in her arm.

She stated that after about twenty minutes, someone came with a truck and loaded 17 injured and several dead villagers on the truck, including her. As she was lying in the bed of the truck, surrounded by at least two dead children, two helicopters descended and one began firing at the truck. Witness #2 testified that these helicopters were near enough to the truck to observe that it was carrying wounded children and adults away from a town that had just been devastated by an explosion. Witness #2, a child at the time, when asked what she was thinking as the helicopter was firing at the truck stated, "They'd do us a favor if they put us out of our misery."

Witness #3 testified that as she was preparing breakfast for several children, she heard screaming, observed complete blackness, and then discovered three of the little girls in her home dead. Because she was inside her home when the bomb exploded, she did not observe the origin of the bomb. However, she personally witnessed helicopters descend and fire upon a truck that was transporting wounded villagers to the hospital. She also stated that someone in the truck was waving a white T-shirt.

Section 4 of Article 38 directs States Parties not only to make minimal or reasonable efforts to ensure protection of children during conditions of armed conflict, but specifically states that the government "shall take all feasible measures" to protect its children during military strife.

Witness #1 stated that he could recall no time when the government took action to protect children from the kind of armed conflict that took place in Santo Domingo. None

of the witnesses had knowledge of any feasible measure taken by the Colombian government to ensure the protection and care of the children of Santo Domingo. There were no military warnings issued to villagers, no recommendation that children be temporarily evacuated, no area designated to protect children in Santo Domingo from armed conflict. In addition, each witness testified that after the initial attack, helicopters impeded efforts of the civilians to transport wounded children and adults to medical facilities.

Witnesses testified that helicopters were flying so near the ground and visibility was so high that it would be impossible for anyone in the helicopter not to observe that the truck was carrying dead and wounded villagers, including several children. Also, someone in the truck was waving a white T-shirt to alert the pilots of the military helicopters of their peaceful mission.

The testimony of these three witnesses and documentary support provide convincing evidence concerning the Colombian government's failure to comply with Article 38 of the CRC in Santo Domingo. There are numerous "feasible measures" the Colombian government could have taken to ensure the protection and care of its children. As early as 1994, the Committee on the Rights of the Child suggested, in its report of preliminary observations of Colombia's compliance with the Convention of the Rights of the Child, that a new attitude and approach be developed, particularly as regards the police and the military, in order to enhance respect for all children. As recently as June 1999, the Committee reiterated that "the general climate of violence largely caused by or related to this [armed] conflict is not only negatively affecting the implementation of the Convention, but has led to systemic violations of children's rights." In addition, the Committee expressed concern "about the direct effects of the armed conflict which has led to a high death toll, a large scale of internal displacement of children, the destruction of educational and health infrastructure ... all of which have a very negative impact on the development of children."

The Tribunal's Judgment concludes that the Colombian government is responsible for the actions of the Colombian Air Force, whose personnel dropped a bomb on a small village during a bazaar orchestrated by and for its children. The Tribunal opinion concludes that the Colombian military harassed the villagers attempting to transport injured and dying children to the hospital, and continued to fire on these children at close-range. The Colombian government has not held any person accountable for these actions.

In addition, the Tribunal has found that the Colombia government's cumulative actions and inactions on December 12th and 13th of 1998 (and subsequently) in the small town of Santo Domingo are evidence of its failure to implement its obligations under Article 38 of the CRC.

Article 39: Recovery and Reintegration of Child Victims of Armed Conflicts

Article 39 of the CRC states:

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

During the Tribunal hearings, witness three was specifically asked if the government of Colombia had taken *any* measures to assist the recovery of wounded survivors subsequent to the dropping of a bomb in Santo Domingo. She replied "No. It hasn't taken any measures." Another witness agreed that he could not recall any actions taken by the Colombian government to promote the physical and psychological recovery of the survivors in Santa Domingo, or to promote their social reintegration.

In the days between the explosion and the return of the victims to Santo Domingo, unidentified perpetrators ransacked homes and businesses in the hamlet. Witness #4 reported that when he returned to his store in Santo Domingo on December 26, 1998, much of the merchandise was missing or damaged. In addition, he reported finding several bags inside the store, which were labeled "For the Exclusive Use of Colombian Armed Forces." Witness #1 testified that when he returned to Santo Domingo around December 27, 1998, it had been "sacked," padlocks had been broken, and many houses were robbed.

None of the witnesses testified to a single act by the Colombian government to promote the recovery or reintegration of the wounded or surviving children of Santo Domingo. No documents or reports indicate such actions. Shrapnel remains embedded in the arm of Witness #2, a child at the time of the injury, leaving her with limited use of her arm. This [now] young woman also testified that she informed a government investigator that she had been injured by something coming from a military helicopter, but received no further contact from the official investigator or any other government representative. Additionally, Witness #3 provided testimony that the Colombian government failed to offer any assistance to her or her family for the loss of their home.

As recently as 26 June, 1999, the government of Colombia submitted a periodic report on its compliance with the Convention on the Rights of the Child to the Committee on the Child. In the report, the government stated that child victims of anti-personnel mines or children who experienced loss or injury as a result of acts of violence provided for in Act. No. 241 of 1995 were protected by a personal accident insurance policy, and that all children could obtain humanitarian assistance as a result of the agreement between the Colombian Red Cross and the Social Solidarity Network. They also note that the Ministry of Education is working on education for children affected by the armed conflict since 1989.

There is no evidence that the Colombian government made any efforts to comply with the recovery and reintegration mandates of Article 39 of the CRC. In the two years since the bomb was dropped on Santo Domingo, the government of Colombia did not

offer special medical, physical, or psychological services to the child survivors. It did not offer to compensate wounded child victims for medical expenses incurred by their families. It did not offer wounded or surviving child victims counseling to help them deal with the loss of their parents, siblings, and peers.

In addition, the Colombian government has not attempted to promote the social reintegration of the surviving children into society. Upon returning to Santo Domingo, these children lived in homes damaged by the bombing and subsequent ransacking. While the CRC provides that "recovery and reintegration shall take place *in an environment which fosters the health, self-respect and dignity of the child*," these surviving children returned to an environment described as "unsafe," "emotionally damaging," and "insulting."

Because the government of Colombia has not taken any measures to promote the recovery or social reintegration to the children of Santo Domingo after the lethal explosion in their town, I concur with the Judgment of the Tribunal that it is in violation of Article 39 of the CRC.

Other Relevant Sections of the CRC: Rights of the Child

Article 2.1 of the CRC states:

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

Article 3.2 of the CRC states:

States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

Article 4 of the CRC states:

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 6 of the CRC states:

1. States Parties recognize that every child has the inherent right to life.
4. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 19.1 of the CRC states:

States Parties shall take all appropriate legislative, administrative, social, and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Article 24.1 of the CRC states:

States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

Article 24.2(b) of the CRC states:

States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care.

Based on the evidence summarized in the Tribunal opinion, it is plain that the government of Colombia failed to:

- ensure the protection and care necessary for the well-being of its children;
- ensure to the maximum extent possible the survival and development of its children; and
- ensure that no child was deprived of access to the highest attainable standard of health care services,

in violation of multiple sections of the CRC.

Violations of Other International Human Rights Treaties Regarding Children

The American Convention on Human Rights (ACHR)

On November 22, 1969, Colombia signed the American Convention on Human Rights, and later ratified it on May 28, 1973.

Article 19 of the ACHR states "Every child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state." This portion of the ACHR mandates States Parties to protect their minor children. The government of Colombia took no measures to protect the children of Santo Domingo on the weekend of December 12th and 13th of 1998.

While this is the only clause of the ACHR specifically regarding children that is applicable to the current case, children are included in other sections of the ACHR referred to in the Tribunal's Judgment.

International Covenant on Civil and Political Rights (ICCPR)

The Republic of Colombia signed the ICCPR of December 12, 1966, and ratified it on October 29, 1969.

Article 24-1 of the ICCPR explicitly mentions children, stating:

Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society, and the state.

Similar to the language in the ACHR, this portion of the ICCPR mandates the state to protect its children. Tribunal evidence concerning the incident at Santo Domingo demonstrates that the Colombian government has failed to comply with this directive. Like the ACHR, the ICCPR incorporates children into its other provisions, which the Tribunal's Judgment concludes have been violated by the government of Colombia.

The Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC)

There are no clauses of this document, specific to children, that are applicable concerning the incident at Santo Domingo. The Tribunal's Judgment regarding this international law also applies to the children of Santo Domingo.

Protocol Additional To the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)

Article 4 of Protocol II specifies the care and aid owed to children, and states:

3. **Children shall be provided with the care and aid they require, and in particular...**
 - (e) **Measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area**

in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.

This provision of Protocol II mandates the government to provide children "with the care and aid they require," and requires states to "remove children temporarily" from the site of the conflict.

Military personnel in the helicopters circling Santo Domingo on December 12, 1998 could observe festival preparation, the presence of children, and had knowledge that children lived in this town. The Colombian government could have taken measures to temporarily remove the children from the area of hostilities, or warned the citizens of the town of potential armed conflict. It did not make efforts to remove the children temporarily from the area where hostilities were taking place, identify a safer area, or warn the adult villagers.

In its 1999 periodic report to the Committee on the Child, the Colombian government noted that Protocol II, acceded to without reservations of any kind, entered into force on 15 February 1996 and is "thus applicable throughout the national territory, as is understood by government officials and by the members of the armed forces, in particular." It further notes that the ICBF (Colombian Family Welfare Institute) has "played an active role...to ensure the implementation of international humanitarian law, particularly with regard to the non-involvement of minors in armed conflict." There is no evidence from the testimony or the documents, that the ICBF was involved with the children of Santo Domingo or that the Republic of Colombia implemented Protocol II.

The government of Colombia had the opportunity to protect its children by implementing this clause of Protocol II. However, the government of Colombia did not take this course of action and is in violation of this Article. In addition, it is also in violation of several Articles of Protocol II mentioned in the Tribunal's Judgment, which are also applicable to children.

Conclusions of Law

Applying the substantive law applicable to this proceeding, this member of the Tribunal concludes, consistently with the Tribunal's Judgment, that the Republic of Colombia is responsible for the following violations of international human rights and humanitarian law relating to children:

1. **The Care and Protection of Children Affected by Armed Conflict.** The Convention on the Rights of the Child, Article 38, obligates the Republic of Colombia to "take all feasible measures to ensure protection and care of children who are affected by armed conflict". The government of Colombia violated Article 38 of CRC.

2. **The Recovery and Reintegration of Child Victims of Armed Conflict.**
Article 39 of the Convention of the Rights of the Child requires the Republic of Columbia to "take all appropriate measures to promote the physical and psychological recovery and social reintegration of a child victim of ... armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child." The government of Colombia violated Articles 39 of the CRC.

3. **The Care and Protection Necessary for Child Well-Being, the Survival and Development of the Child, Measures to Protect the Child from Injury, and Access to the Highest Attainable Health Care Services.**

Articles 3.2, 6, 19.1 and 24.1 of the Convention on the Rights of the Child require the Colombian government to ensure "to the maximum extent possible" and by taking "all appropriate measures" the above rights to well-being, care and protection, survival and development, protection from injury, and access to the highest attainable health care services. The government of Colombia violated Articles 3.2, 6, 19.1 and 24.1 of the CRC.

4. **Protection and Removal of Children Temporarily from the area of Hostilities.**

The Geneva Convention and Article 4 of Protocol II, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights, all adopted and ratified by the Republic of Colombia, require the government to protect and removed children from areas of armed conflict. The government of Colombia has violated this Article 4 of Protocol II of the Geneva Convention, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights.

Therefore, this writer concurs in the Judgment of the Tribunal and further concludes that the Republic of Columbia is responsible for violations of the human rights of children, under the above instruments of international and humanitarian laws.